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91-99

No.

Supreme Court, U.S.
FILED
JUL 17 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

RONNIE CURTIS, LANCE CORPORAL,
UNITED STATES MARINE CORPS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

1. Did the Court of Military Appeals correctly hold that Congress had implicitly delegated to the President the power to prescribe the constitutionally-required aggravating factors that must be specified before the death penalty may be imposed, where there is no statute explicitly authorizing the President to prescribe such factors for the crime committed here, and, if Congress made such a delegation, is it consistent with the doctrine of separation of powers, particularly when applied to the death penalty for crimes committed by members of the armed forces?

2. May a panel of fewer than twelve persons who are not judges constitutionally convict a defendant of a capital offense and make the discretionary decision to impose a death sentence?

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No. _____

RONNIE CURTIS, LANCE CORPORAL,
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v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Ronnie Curtis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on April 18, 1991.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991), is reprinted as Appendix A (1a-39a). The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Curtis*, 28 M.J. 1074 (N.M.C.M.R. 1989) (en banc), is reprinted as Appendix B (1b-84b).

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on April 18, 1991. 28 U.S.C.

§ 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the Court of Military Appeals' decision affirming his conviction. The Court of Military Appeals bifurcated its consideration of this case, resolving systemic challenges to the military death penalty scheme in the opinion which petitioner now asks this Court to review, and saving case-specific challenges for later proceedings. Although the Court of Military Appeals has not completed its consideration of the case, its April 18, 1991 decision falls within this Court's certiorari jurisdiction. *See Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986); *Frisby v. Schultz,* 487 U.S. 474, 479 (1988).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. Const. art. I, § 8

> The Congress of the United States shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.

U.S. Const. art. II, § 2

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.

U.S. Const. amend. V

> No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

U.S. Const. amend. VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Uniform Code of Military Justice art. 16, 10 U.S.C. § 816.

Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—(1) general courts-martial, consisting of—(A) a military judge and not less than five members[.]

Uniform Code of Military Justice art. 18, 10 U.S.C. § 818.

Jurisdiction of general courts-martial

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjust any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter.

Uniform Code of Military Justice art. 25, 10 U.S.C. § 825.

Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c)(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session

called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least, one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d)(1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

Uniform Code of Military Justice art. 36, 10 U.S.C. § 836.

President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

Uniform Code of Military Justice art. 55, 10 U.S.C. § 855.

Cruel and unusual punishments prohibited

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

Uniform Code of Military Justice art. 56, 10 U.S.C. § 856.

Maximum limits

The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

Uniform Code of Military Justice art. 106a, 10 U.S.C. § 906a.

Espionage

(a)(1) Any person subject to this chapter who [is guilty of espionage] shall be punished by death or

such other punishment as a court-martial may direct.

* * * * * *

(b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless—

(A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and

(B) the members unanimously determine that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including the aggravating factors set out under subsection (c).

(c) Findings under this subsection may be based on—

(1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.

(2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.

(3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.

(4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36).

Uniform Code of Military Justice art. 118, 10 U.S.C. § 918.

Murder

Any person subject to this chapter who, without

justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

28 U.S.C. § 2072.

Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1004. Capital Cases

(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

* * * * * *

(7) That, only in the case of a violation of Article 118(1):

* * * * *

(B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

* * * * *

(J) The accused has been found guilty in the same case of another violation of Article 118[.]

STATEMENT OF THE CASE

Petitioner, a Marine Corps lance corporal at the time of the offense, was convicted by a court-martial consisting of nine Marines of having committed the premeditated murders of his supervisor, First Lieutenant James F. Lotz, and his wife, as well as several other related offenses arising out of the same incident, all of which occurred while petitioner was under the influence of alcohol. The prosecution sought the death penalty, which Article 118(1) of the Uniform Code of Military Justice, 10 U.S.C. § 918(1) ("UCMJ"), specifically authorizes for premeditated and felony murder. The court-martial members, none of whom were judges or lawyers, voted to impose a death sentence. As set forth more fully below, the conviction and death sentence were upheld by the lower courts over the objections raised by this petition—that neither any of the arguably relevant statutes nor the Constitution allows the President to prescribe the aggravating factors that are

a constitutional prerequisite for the imposition of any death penalty, and that a lay panel must consist of twelve members before it may impose a death sentence. In order to clarify the first issue, it is necessary to review briefly certain death penalty decisions of this Court and the Court of Military Appeals.

In *Furman v. Georgia,* 408 U.S. 238 (1972), and *Gregg v. Georgia,* 428 U.S. 153 (1976), this Court ruled that the Eighth Amendment placed significant limitations on the government's power to impose the death penalty. Of particular relevance to this case is the requirement that the class of those convicted of capital crimes must be narrowed by rational criteria that confine the fact-finder's discretion concerning whether the particular circumstances warrant the death penalty. Although there was no reason to doubt those decisions' applicability to courts-martial, it was not until 1983 that the Court of Military Appeals specifically ruled that courts-martial could not impose death sentences because the military justice system failed to require that the sentencing authority "make specific findings as to individualized aggravating circumstances." *United States v. Matthews,* 16 M.J. 354, 380 (C.M.A. 1983). Although not necessary to the decision there, the *Matthews* court suggested that the gap could be filled either by Congress or the President. *Id.* at 380-81.

The President did not wait for Congress, but instead issued an Executive Order in January 1984 that amended the 1969 Manual for Courts-Martial by establishing a capital sentencing provision which set forth specific aggravating factors for military death penalty offenses. Exec. Order No. 12,460, 49 Fed. Reg. 3169 (1984). In August 1984, when the current Manual came into effect, Executive Order 12,460 was rescinded, and the capital sentencing scheme was incorporated in Rule for Courts-Martial 1004. Manual for Courts-Martial, United States, 1984,

Exec. Order 12,473, 49 Fed. Reg. 17,152 (1984) ("1984 Manual") (the version of Rule 1004 originally adopted in 1984 is set forth in full in Appendix C). In adopting Rule 1004, the President relied on Articles 18, 36, and 56 of the UCMJ and his authority as Commander in Chief of the Armed Forces under Article II, section 2, clause 1 of the Constitution. Rule for Courts-Martial 1004 drafters' analysis, 1984 Manual (set forth in full in Appendix D).

The first of these Articles, all of which Congress enacted as part of the UCMJ in 1950, allows general courts-martial to impose "any punishment not forbidden by the chapter, including the penalty of death when specifically authorized by this chapter" subject, however, to "such limitations as the President may prescribe." 10 U.S.C. § 818. The second, Article 36, authorizes the President to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof" for courts-martial, "which shall so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. § 836. The third statutory provision, Article 56, does not grant authority to the President, but rather precludes courts-martial from imposing punishments which "exceed such limits as the President may prescribe[.]" 10 U.S.C. § 856. Finally, Article II's Commander in Chief provision makes no mention of prescribing factors for death penalties or any other matters relating to courts-martial; instead, the Constitution gives to Congress the power "To make Rules for the Government and Regulation of the land and naval Forces." Article I, section 8, clause 14.

After having found petitioner guilty of murdering both Lt. Lotz and his wife, the court-martial proceeded to the

sentencing phase, operating under Presidentially-promulgated Rule 1004 to supply the necessary aggravating factors, specifically factors (7)(B)—murder while engaging in another crime, here burglary; and (7)(J)—having been found guilty of another murder in the same case.[1] Based on its findings of those aggravating factors, and the absence of sufficient countervailing mitigating factors, the panel sentenced petitioner to death.

On appeal, petitioner challenged the President's authority to establish death penalty aggravating factors.[2] The Navy-Marine Corps Court of Military Review, sitting en banc, rejected this argument. *United States v. Curtis,* 28 M.J. 1074 (N.M.C.M.R. 1989) (en banc) (Appendix B). The court ruled that death penalty aggravating factors are procedural rather than substantive and thus fall within the congressional delegation to the President of power to prescribe court-martial procedures. App. 15b (citing 10 U.S.C. § 836 (1982)). The court also found that Congress had provided the President with sufficient guidance to limit his discretion in establishing a military death penalty system. App. 18b. Judge Albertson dissented from this portion of the opinion, reasoning that, even if Congress did delegate to the President authority to establish a military death penalty system, such a delegation was unconstitutional because it was not accompanied by "specific and

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[1] The "other murder" was that of Mrs. Lotz, after killing Lt. Lotz; the "burglary" was the unlawful entry into the Lotz home, under the false pretenses of a legitimate purpose, with the intent to commit the murder of Lt. Lotz.

[2] This issue was not raised at trial. Nevertheless, both the Navy-Marine Corps Court of Military Review and the Court of Military Appeals addressed this argument's merits in their opinions, thereby preserving the issue. *Schad v. Arizona,* 59 U.S.L.W. 4762, 4763 n.2 (U.S. June 21, 1991) (plurality opinion).

detailed standards" to guide the President. App. 76b (Albertson, J., concurring/dissenting).[3]

Upon further appeal, the Court of Military Appeals bifurcated its consideration of the case, resolving systemic challenges to the military death penalty system before considering factual arguments unique to petitioner's case. In an opinion rendered on April 18, 1991, the court rejected petitioner's argument that the President acted without authority in establishing death penalty aggravators for courts-martial. *United States v. Curtis,* 32 M.J. 252 (C.M.A. 1991) (Appendix A). While the result is clear, the rationale by which the court reached it is difficult to discern.

To begin with, while the Executive Order creating Rule 1004 specified three Articles in the UCMJ as sources of the authority to prescribe aggravating factors, the Court of Military Appeals barely mentioned them, and never attempted to demonstrate how they specifically authorized the President to establish death penalty aggravators. Much of the court's discussion centered around Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952), but it then specifically abjured any reliance on the President's inherent authority as Commander in Chief. *See* App. 21a n.9. It also discussed at some length this Court's non-delegation opinions, including in particular *Mistretta v. United States,* 488 U.S. 361 (1989), but never pointed to specific statutory language by which to judge the delegation's validity.

Instead, the court upheld Rule 1004 on the theory that Congress did not object to the President's exercise of that power and seemingly approved it when it adopted its own

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[3] Another judge dissented separately, concluding that because "racial stereotyping, by one of the two murder victims, precipitated appellant's violent acts," the death penalty was an inappropriate penalty in this case. App. 43b (Byrne, C.J., concurring/dissenting).

death penalty provision, limited to espionage, which sets forth three specific aggravating factors and explicitly authorizes the President to prescribe others *for that crime*, in an act that was passed a year after the President issued Rule 1004. *See* Pub. Law No. 99-145, § 534(a), 99 Stat. 634 (1985) (codified at UCMJ Art. 106a, 10 U.S.C § 906a). For example, the court observed that "Congress has been willing for the President to play the major role in determining what punishments may be imposed by courts-martial" (App. 16a), and that it was "unaware of any indication of legislative displeasure with the President's action or any legislative effort at that time to undo his action to curtail the use of capital punishment in courts-martial." App. 18a. Similarly, the court argued that the "failure of Congress to complain about the content of [Rule 1004] can be construed to be ratification" (App. 20a) and the "implication" from the passage of the special death penalty provision governing espionage is "that Congress does not consider the President's prescribing 'aggravating factors' to be in diminution of its own legislative power." *Id.* Thus, the court said, "we conclude that Congress has – at least, implicitly – delegated this task [of defining the aggravating factors] to the President . . ." App. 21a n.9.[4]

Satisfied that it had surmounted the statutory issues, the court turned to the constitutionality of the implicit delegation. To find the necessary guidance from Congress, the court again relied on the subsequently-enacted Article 106a and its authorization for the President to prescribe additional aggravating factors for espionage. From Article 106a's reference to Article 36, the court concluded that "[a]pparently Congress wished the President to look to the 'principles of law' applied in federal criminal cases in de-

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[4] After the enactment of Article 106a, the President amended Rule 1004 to take account of the new capital espionage offense and to make other minor changes. Exec. Order No. 12,550, 51 Fed. Reg. 6497 (1986).

termining what should be the 'aggravating factors' for capital cases tried by court-martial." App. 22a. The court proceeded to examine the source of each of the aggravating factors in Rule 1004(c)—App. 22a-28a—in order to support its finding that "they reflect policy expressed by Congress in various statutes—including several punitive articles of the Uniform Code of Military Justice—and also conform generally with the Model Penal Code and with policies expressed in the statutes of many of the 36 states which authorize the death penalty." App. 22a. It reinforced its conclusion by pointing out that "the President acted in reliance on legislative policy expressed in the Uniform Code of Military Justice and in other federal statutes," App. 29a, although none of those statutes speaks directly to the subject of Rule 1004. The court then returned to Article 106a and its delegation for espionage crimes, which it saw as an "approval of the standards which the President theretofore had employed" for all capital offenses covered by Rule 1004. App. 30a. Because the court found that "Congress not only acquiesced in his performance of this task but also tacitly ratified the 'aggravating factors' when it enacted Article 106a of the Uniform Code," it concluded that the delegation was proper. App. 30a.

The opinion also rejected petitioner's Eighth Amendment argument that a defendant may not be sentenced to death by a panel of fewer than 12 lay persons. App. 32a; *see also id.* at 39a (Sullivan, C.J., concurring). The court reasoned:

> Under RCM 1004, the court-martial members—who have been chosen pursuant to the criteria set forth in Article 25 of the Code, 10 USC § 825—must be unanimous in finding aggravating factors. The military judge can, at least, recommend a commutation of a death sentence adjudged; and the convening

> authority is empowered to commute the sentence. Furthermore, a Court of Military Review, composed of trained appellate military judges, must thoroughly review the law, the facts, and the appropriateness of the accused's sentence. In view of all these safeguards, we are not convinced that a court-martial must have 12 members in a capital case when this is not required in any other type of trial.

App. 31a-32a (footnotes omitted).[5]

REASONS FOR GRANTING THE WRIT

I.

THE PRESIDENT'S AUTHORITY TO PROMULGATE AGGRAVATING FACTORS FOR CRIMES COMMITTED BY SERVICE MEMBERS PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE TO THE ADMINISTRATION OF JUSTICE IN THE ARMED FORCES WHICH THE COURT BELOW DECIDED IN A MANNER INCONSISTENT WITH FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION AND SEPARATION OF POWERS.

A.

At issue in this case is whether members of the armed forces can be sentenced to death for twelve offenses for which Congress has failed to specify the constitutionally-necessary aggravating factors, but where the President has acted to fill in that void. In addition to petitioner, there are four other service members who are currently subject to a sentence of death,[6] but that hardly begins to define

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[5] This issue had not been raised at trial or before the Navy-Marine Corps Court of Military Review. Nevertheless, the Court of Military Appeals addressed the merits of this argument in its opinion, thereby preserving the issue. *Schad v. Arizona*, 59 U.S.L.W. 4762, 4763 n.2 (U.S. June 21, 1991) (plurality opinion).

[6] *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990) (en banc); *United States v. Gray*, 32 M.J. 730 (A.C.M.R. 1991); *United States v. Thomas*, __ M.J. __, No. 89-1289 (N.M.C.M.R. May 31, 1991); *United States v. Loving, appeal docketed*, No. 8901123 (A.C.M.R. July 5, 1989).

the affected class. Every person who is now or may in the future be charged with a crime for which the UCMJ permits the death penalty has a vital interest in the outcome of this issue. That interest is triggered the moment that a charge for which the Code permits the death penalty is preferred, because the possibility that the ultimate punishment may be imposed potentially alters every strategic and tactical judgment in such a case.

The military, as well as society in general, also has a vital interest in the prompt resolution of this issue. Until it is resolved, every accused will have to raise the issue, both on direct appeal and on *habeas corpus* review, thereby consuming valuable resources of the courts and prosecutors. If Rule 1004 is ultimately invalidated, every prisoner on the United States Disciplinary Barrack's death row will have his sentence reversed. If Congress were to then reactivate the death penalty by enacting aggravating factors, the military might be able to retry these prisoners.[7] *See Dobbert v. Florida*, 432 U.S. 282 (1977). The sooner this issue is resolved, the smaller the number of such retrials; thus, concern for both judicial and fiscal economy supports a prompt resolution of the military death penalty's constitutionality.

Review is also appropriate in order to resolve a conflict between the decision below and the Ninth Circuit's decision in *United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984). Here, the Court of Military Appeals held that the President could, without offending the separation of powers doctrine, prescribe death penalty aggravating factors. In *Harper*, the Ninth Circuit overturned a district court's ruling that the court itself could adopt guidelines to limit the sentencing authority's discretion in determin-

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[7] Congress could, of course, choose not to give these newly-enacted aggravators retroactive effect.

ing whether to impose the death sentence for a violation of the Espionage Act, 18 U.S.C. § 794. The Ninth Circuit concluded that such limiting guidelines "must be expressly articulated *by the legislature* in the statute authorizing the death penalty." 729 F.2d at 1225. The Court of Military Appeals' holding that the President may prescribe aggravating factors is inconsistent with the Ninth Circuit's approach, if not its holding.

Although other issues remain for the Court of Military Appeals' consideration in this case, none affects the purely legal question of the President's authority to prescribe death penalty aggravators. In the past, this Court has chosen to exercise its certiorari jurisdiction over cases which were not final, but which raised legal questions of "substantial importance." *See e.g., Frisby v. Schultz*, 487 U.S. 474, 479 (1988). This is such a case.

B.

Review is also warranted because the decision below is fundamentally at odds with basic principles of statutory construction and separation of powers. The first question that the Court of Military Appeals had to decide was whether Congress had authorized the President to prescribe the necessary aggravating factors. Instead of analyzing the language of the three Articles that the President had cited to support Rule 1004, the court found an "implicit" delegation springing from congressional inaction or acquiescence, lack of displayed displeasure, and implications from other statutes dealing with related but different matters. On the basis of this "implicit" delegation, the court allowed the President to embark on an open-ended, unguided process of deciding for all military capital offenses those factors which are and which are not to be considered as warranting imposition of the death penalty. Whether any of the statutes upon which the Presi-

dent relied provides the necessary authority is itself quite questionable, but the very notion that congressional silence can provide a basis for executive action is fallacious. "Congressional inaction cannot amend a duly enacted statute." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989). Nor should congressional silence be construed as endorsement of a regulation issued in the name of a statute. As Justice Scalia forcefully reminds us:

> [O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [congressional] intent from the *failure* to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

Johnson v. Transportation Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., joined by Rehnquist, C.J., dissenting).

The court's method for finding the necessary "intelligible principle" to guide the delegee's discretion, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), is similarly problematic. Rather than citing *any* statutory language guiding the President in selecting aggravators, the court turned to other federal statutes, state laws, and the Model Penal Code to find support for the factors chosen by the President. The court set sail on a wholly novel constitutional course, not followed by any other decision of this or any other court. While this Court has deferred to Congress to a considerable degree in this area, *see Mistretta v. United States*, 488 U.S. 361 (1989), it has never sustained a delegation under one law by refer-

ence to a delegation under another law, let alone by reference to standards embodied in statutes from other jurisdictions. This deviation from the norm is vastly compounded by the lower court's reliance on an implicit rather than explicit delegation as the basis from which the "intelligible principle" is to be derived. It is one thing to uphold a sweeping delegation when Congress has made an explicit choice to assign broad policy roles to the executive, but it is quite another to do so when the delegation is not even found in a law that Congress passed, but in implications from other laws and congressional silence. If that theory of delegation were to be upheld, there would be few if any limits on executive power. The sweeping implications of the lower court's decision provide another basis for review.

C.

To the extent that the Court of Military Appeals relied on Article 36, App. 22a, its ruling is on no firmer footing. That provision applies only to pretrial, trial and post-trial "procedures, including modes of proof," language that seems far afield from the quite substantive and policy-laden decisions about what factors are sufficiently egregious as to warrant the death penalty. Surely, no one would argue that similar language authorizing the Supreme Court to issue rules of criminal procedure, 28 U.S.C. § 2072, could be used to fill the comparable gaps under the federal criminal code, nor that those provisions could have been used to establish sentencing guidelines, yet that would seem to be the inevitable effect of construing Article 36 as the ruling below suggests. The fact that every state to have adopted death penalty aggravators since *Furman v. Georgia* has done so by legislation is not dispositive, but it at least suggests that executive action is not the norm and that courts should be reluctant to con-

clude that when Congress enacted the UCMJ in 1950, it intended Article 36 to grant this kind of power to the President.

Contrary to the position of the court below, the presence of Article 106a, enacted after Rule 1004 was issued, supports petitioner and not the government. Article 106a is limited to espionage cases and, in addition to authorizing the President to prescribe aggravators, specifies three conditions that warrant the death penalty. The fact that Congress was so explicit in this limited area, and that it decided to proceed by statute instead of simply allowing the President to adopt aggravators *sua sponte*, negates any inference that the President already had the power to establish the necessary aggravating factors. Even more persuasive is the presence of the specific grant for the President to expand upon the listed factors, a grant that would be wholly unnecessary if Article 36 or any other provision of the UCMJ already gave him that authority. *See* N. Singer, 2A *Sutherland's Statutory Construction* § 46.06 (4th ed. 1984).

Another factor suggesting that Congress did not intend to silently empower the President to decide upon aggravating factors is the range of choices that such a decision entails. That can easily be seen from the lengthy list of aggravators that the President compiled for the military death penalty crimes, which include very different factors for the various offenses. *See* Appendix C. As the government put it at page 70 of its Brief in Response to Court Order in the Court of Military Appeals, the death penalty is "different in the character of the moral judgment that accompanies the identification of those circumstances and the conclusion that those circumstances are not outweighed by the available mitigating and extenuating factors." Whatever may be included in Article 36's "procedures," such moral judgments are not among them.

Similarly troublesome is the concentration of power which such a delegation would create. In the armed forces, the President is the Commander in Chief, and hence the ultimate superior of those who bring charges against every accused. Thus, to allow the President to fill this vacuum would be to assign to the superior of the prosecutor the power to decide the circumstances under which an accused may live or die. The Framers were very concerned about uniting in one person the power to both write the laws and execute them, *The Federalist* No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961), as was Congress when it decided to place the Sentencing Commission in the judicial and not the executive branch. S. Rep. No. 98-225, 98th Cong., 1st Sess. 159 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3342. Even assuming that such a joinder did not violate separation of powers, the Court should assume that Congress did not intend such a blending of functions unless there is the clearest language authorizing it.

D.

Construing Articles 18 and 36 narrowly to reject a delegation to the President of power to prescribe death penalty aggravating factors would allow the Court to avoid the difficult question of such a delegation's constitutional validity. *See generally Rust v. Sullivan*, 111 S. Ct. 1759, 1771 (1991); *id.* at 1788-89 (O'Connor, J., dissenting). There is not a word in any statute or the legislative history to show what Congress intended the President to do or not do in establishing the aggravating factors for each crime. Given the range of choices for each offense, how could the courts determine whether there was an "intelligible principle" to apply, and how could they decide whether the President had complied with what are essentially no directions under these provisions? *See Touby v. United States*, 111 S. Ct. 1751, 1756 (1991).

It is not that there were *no* sources for the factors that the President chose. Rather, as the Court of Military Appeals proved, App. 22a-28a, the problem is that there are too many possible choices and no guidance from Congress on how to pick and choose from among them. Indeed, the court below found that some factors were derived from various federal statutes, others from state laws, and still others from the Model Penal Code, yet there is no rationale for relying on one source rather than another for a given offense—other than the "moral judgment" of the President, the official under our Constitution who is supposed to carry out decisions of that kind, not make them.

This leads to the next constitutional difficulty that can be avoided by construing Article 36 against a delegation. Even if the President might constitutionally fill in the gaps for civilian federal offenses, the delegation here is even more problematic because the Framers were so careful to divide the responsibility for military affairs between the President and Congress. Thus, Article II, section 2 makes the President the Commander in Chief, but it is Congress to whom the Framers gave the power "to make Rules for the Government and Regulation of the land and naval Forces" under Article I, section 8, clause 14. This special and quite specific division of power, beyond that embodied in the basic separation of powers doctrine, suggests a further concern about uniting executive and legislative power in the military context.

In light of the heightened scrutiny which the Eighth Amendment compels where the death penalty is involved, even the most explicit delegation, coupled with carefully drawn standards, would raise serious constitutional issues. Such issues can be avoided by construing Articles 18, 36, and 56 narrowly, thus denying the President the life and death power to promulgate the aggravating factors needed to reactivate the death penalty in the military. Identifying factors which place a criminal defendant's life in the

balance is precisely the kind of decision that has traditionally been made by legislative bodies who are most responsive to the will of the people, not by a single executive who can simply decide the matter on his own, with no checks and balances in the process.

* * *

The court below fundamentally erred when it assumed that Congress had implicitly delegated to the President the profound question of who shall live and who shall die. That question embodies judgments that go to the heart of our values as a society, and it should never be assumed that Congress would delegate that responsibility without saying so explicitly. Because neither the reasons given by the court below nor those advanced by the Rule's drafters can sustain Rule 1004, and because of the importance of the issue to the administration of justice in the military, this Court should grant review on the first question presented.[8]

II

THE CONSTITUTIONALITY OF ALLOWING A PANEL OF FEWER THAN TWELVE LAY PERSONS TO IMPOSE A DEATH SENTENCE IS AN IMPORTANT QUESTION OF FIRST IMPRESSION.

While this Court has consistently held that the Sixth Amendment right to trial by jury does not apply to courts-

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[8] In issuing Rule 1004, the President relied only obliquely ("*See also*") on his powers as Commander in Chief. App. 1d. The lower court did not rest its decision on that ground. App. 21a n.9. Accordingly, the issue of the President's inherent power to issue Rule 1004 is not presented. Should the respondent seek to defend the judgment below on that ground, that defense would fail for the reasons set forth above regarding the separation of powers basis for construing the UCMJ as petitioner urges.

martial,[9] the Eighth Amendment protects a capital defendant's right to a reliable process. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see also* U.S. Const. amend. V. Article 55 of the UCMJ, which prohibits "cruel or unusual punishment," provides additional protection to service members. 10 U.S.C. § 855; *see United States v. Matthews*, 16 M.J. 354, 368-69 (C.M.A. 1983).

The UCMJ and the Rules for Courts-Martial allow a panel of as few as five lay members to impose a death sentence. UCMJ Art. 16(1)(A), 10 U.S.C. § 816(1)(A); Rule 501(a), 1984 Manual. Petitioner was convicted of a capital offense and sentenced to death by a panel of just nine lay members. The imposition of the death penalty by such a small group of lay members is inherently unreliable and, thus, impermissible under the Fifth and Eighth Amendments.

A state may place the capital sentencing decision in the hands of a single judge, whose specialized training and experience makes him or her uniquely qualified to render such a decision. *Proffitt v. Florida*, 428 U.S. 242 (1976). Yet, with the exception of the military justice system, *every* jurisdiction in the country which permits lay members to make the capital sentencing decision requires that the panel include twelve members. *See* Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 Ind. L.J. 617, 627 n.45 (1989). This is true even of states which provide for smaller juries in non-capital criminal cases. *See, e.g.*, Fla. Stat. § 913.10 (1988) ("Twelve persons shall constitute a jury to try all capital cases, and six [illegible]sons shall constitute a jury to try all other cases").[10]

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[9] *See, e.g., Reid v. Covert*, 354 U.S. 1, 37 n.68 (1957); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

[10] Granting review would also allow the Court to resolve a tension between two of its jury-size decisions. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court upheld the use of six-member juries in criminal

Nor does any other jurisdiction permit fewer than twelve members to convict a defendant of a capital offense. This uniform practice is significant. As the Court has noted, "[N]o State provides for less than 12 jurors [in capital cases]—a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty." *Williams v. Florida*, 399 U.S. 78, 103 (1970). The Court should determine whether a departure from this consensus view is constitutionally permissible.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted. In the alternative, the Court should hold the petition pending the United States Court of Military Appeals' resolution of the remaining issues in the case.

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cases. Eight years later, in *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court held that a five-member criminal jury was impermissible under the Sixth and Fourteenth Amendments. Professor Kaye has argued that the empirical evidence upon which Justice Blackmun's lead opinion relied to strike down five-member juries in *Ballew* also "create[s] grave doubt about the proper functioning of the six-member jury." Kaye, *And Then There Were Twelve: Statistical Reasoning, The Supreme Court, and the Size of the Jury*, 68 Calif. L. Rev. 1004, 1025 (1980). After analyzing the empirical data, Professor Kaye concluded, "[A]ny departure from the traditional conception of the 'jury' as a body of twelve persons should be held unconstitutional." *Id.* at 1033. By reviewing this question, the Court could reexamine the relationship between *Williams* and *Ballew*.

Respectfully submitted,

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July 17, 1991

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 63,044
NMCM 87-3856

UNITED STATES, APPELLEE,

v.

RONNIE A. CURTIS, LANCE CORPORAL,
U.S. MARINE CORPS, APPELLANT

Argued Aug. 29, 1990
Decided April 18, 1991

Opinion of the Court

EVERETT, Senior Judge:

Appellant was sentenced to death by a general court-martial convened at Camp Lejeune, North Carolina. The issues now before us are whether the President was empowered to prescribe the procedure under which this sentence was adjudged and, if so, whether the rule he prescribed complied with constitutional requirements.

I

On April 14, 1987, Curtis used a pretext to obtain entry to the home of his supervisor, First Lieutenant James Lotz. His purpose—apparently the result of perceived

racial slurs and the imbibing of gin—was to kill Lotz. He carried out his objective with a knife, and then he killed Lotz' wife, Joan.

[1] After being apprehended, appellant was charged with the premeditated murder of both victims, the burglary of their home, and various other offenses.[1] The convening authority referred the charges to trial as a capital case; and pursuant to RCM 1004, Manual for Courts-Martial, United States, 1984, the Government notified[2] the defense of the "aggravating factors" on which it would rely.

After the general court-martial found Curtis guilty as charged, the Government offered evidence as to these "aggravating factors": (1) that Lieutenant Lotz' murder was aggravated by the murder of his wife; (2) that Mrs. Lotz' murder was aggravated by the murder of Lieutenant Lotz; and (3) that Mrs. Lotz' murder occurred during a burglary,[3] to wit: breaking and entering into

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[1] These offenses included larceny of the knife he used to kill the Lotzes; larcency of their automobiles; and indecent assault on Mrs. Lotz after he had stabbed her. These offenses were in violation of Articles 118, 129, 121, and 134, Uniform Code of Military Justice, 10 USC §§ 918, 929, 921, and 934, respectively.

[2] At trial the defense questioned the validity of the notice because it only listed two "aggravating circumstances," namely: "a. The murder of Joan M. Lotz was committed while the accused was engaged in the commission of a burglary; and b. The accused . . . has been found guilty in the same case of another violation of Article 118." The defense objected to three factors being listed in the instructions and on the sentence worksheet when they were notified of only two. While the judge found the defense was not misled by the notice, it would be advisable for the notice to be precise as to what factors are being relied on for each specification which carries the death penalty.

[3] The Government relied on a "constructive breaking" by means of a pretext. *See* para. 55c(2). Manual for Courts Martial, United States, 1984. Curtis had come to the Lotz home at 2:00 a.m. and had pre-

the Lotz home at night with the intent to commit murder. The general court-martial adjudged the death sentence, which the convening authority approved. Thereafter, the Court of Military Review reviewed the case *en banc* and unanimously affirmed the findings of guilty. 28 MJ 1074 (1989). However, Chief Judge Byrne dissented from affirmance of the death sentence, which he concluded was not appropriate in this case (*id.* at 1095-96); and Judge Albertson dissented from affirmance of the sentence because she believed that RCM 1004 was unconstitutional. *Id.* at 1096-1113.

The case reached this Court for mandatory review. *See* Art. 67(a)(1), Uniform Code of Military Justice, 10 USC § 867(a)(1) (1989). After considering the briefs submitted by the parties, as well as various motions, we concluded that two issues—which were discussed extensively in the Court of Military Review, raised in this Court, and are common to any capital case tried by a court-martial—should be separately considered and argued. These issues were:

I

WHETHER THE CAPITAL PUNISHMENT PROCESS UNDER WHICH APPELLANT WAS SENTENCED TO DEATH IS INVALID BECAUSE IT IS AN IMPERMISSIBLE EXTENSION OF PRESIDENTIAL POWER.

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tended that another Marine had been in an accident. Lieutenant Lotz invited Curtis in while he phoned for assistance. While Lotz was phoning, appellant stabbed him.

II

WHETHER RULE FOR COURTS-MARTIAL 1004 IS UNCONSTITUTIONAL ON ITS FACE.

Thereafter, we received supplemental briefs from the parties and from various amici curiae and then heard extensive oral argument. Aided by the excellent briefs and argument, we now have concluded that the President acted within his powers in promulgating RCM 1004 and that this Rule otherwise satisfies constitutional requirements.

II

A

The Constitution, on its face, does not single out capital cases for special treatment. This point was made in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)—overruling *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), which had drawn a distinction between capital and noncapital cases. Likewise, in *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960), the Supreme Court rejected the attempt by Justices Frankfurter and Harlan to draw a line between capital and noncapital cases with respect to military jurisdiction over civilian defendants abroad.

[2] The Supreme Court, however, has now made clear that the Eighth Amendment requires a different treatment of death-penalty cases. Thus, in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), a majority of the justices agreed that the arbitrary and capricious imposition of capital punishment—which, in their view, characterized most state procedures—violated the Eighth Amendment. *Cf. Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Likewise, in applying double jeopardy protections, a capital case is treated differently

from other cases. *Cf. Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

We observe, also, that in practice, the issues raised by capital cases occupy a significant amount of the time spent by appellate courts. Thus, in its 1989 term, nine cases decided by the Supreme Court were capital.[4] The collateral attacks and multiple reviews in capital cases have posed problems of judicial administration which have troubled Congress, the Supreme Court, the legal profession, and the public.

In regulating military justice, Congress has exhibited a special concern for capital cases. Most of the punitive articles of the Uniform Code of Military Justice provide that a convicted person "shall be punished as a court-martial may direct"; and only for a few crimes—such as wartime desertion, mutiny, sedition, espionage, murder, and rape—is a court-martial empowered to impose "death or such other punishment as a court-martial may direct." *See, e.g.*, Arts. 85(c), 94(b), 106a(a)(1), 118, and 120(a), UCMJ, 10 USC §§ 885(c), 894(b) 906a(a)(1), 918, and 920(a), respectively.[5] Article 45(b) of the Uniform Code, 10 USC § 845(b), prohibits a guilty plea in a capital case. Article 49(f), UCMJ, 10 USC § 849(f), limits use of depositions in

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[4] *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108, L.Ed.2d 255; *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316; *Butler v. McKellar*, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347; *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369, *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415; *Clemons v. Mississippi*, ___ U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725; *Whitmore v. Arkansas*, ___ U.S. ___, 110 S.Ct. 1717, 109 L.Ed.2d 135; *Walton v. Arizona*, ___ U.S. ___, 110 S.Ct. 3047, 111 L.Ed.2d 511; *Lewis v. Jeffers*, ___ U.S. ___, 110 S.Ct. 3092, 111 L.Ed.2d 606.

[5] For premeditated murder or felony murder, the punishment imposable under Article 118 is "death or imprisonment for life."

capital cases. The third clause of Article 134, UCMJ, 10 USC § 934, incorporates the federal criminal code into military justice, but it only does so with respect to "crimes and offenses not capital."

B

In *United States v. Matthews*, 16 MJ 354 (CMA 1983), this Court considered the constitutionality of the sentencing procedure then prescribed for capital cases by the Manual for Courts-Martial. In some respects, this procedure met the requirements which we held had been established by *Furman v. Georgia, supra*, and succeeding Supreme Court cases—requirements which we concluded were applicable to courts-martial. For example, trials by courts-martial are bifurcated—the sentencing proceedings being separate from the adjudication of guilt. The accused has unlimited opportunity to present mitigating and extenuating evidence, which the military judge must identify to the court members for their deliberations on sentence. Moreover, mandatory review of the facts, the law, and the appropriateness of sentence is provided in death cases—as well as in most other cases tried by general court-martial.

The principal defect that *Matthews* identified in the military justice system was that neither the Uniform Code of Military Justice nor the Manual for Courts-Martial required the court-martial members to "specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty." 16 MJ at 379. Thus, upon appellate review, it was impossible to assure that a death penalty adjudged by a court-martial reflected "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Ibid*, quoting *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983).

In *Matthews*, we ruled that either Congress or the President could "take [corrective] action to remedy" the "defect that now exists in the sentencing procedure employed by courts-martial in capital cases." 16 MJ at 380. The majority of this Court concluded that, if new sentencing procedures were authorized, they could be applied retroactively for resentencing Matthews or other servicemembers as to whom death sentences had been adjudged. *Cf. Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). Indeed, we ruled in *Matthews* that if the President or Congress prescribed constitutionally valid procedures for imposing the death penalty within 90 days after we issued our mandate, the new procedures could be used in resentencing the accused. 16 MJ at 382.

Within the 90-day period that had been allowed by this Court, President Reagan amended the Manual for Courts-Martial to provide a new procedure for capital cases. Exec. Order No. 12,460, 49 Fed.Reg. 3169 (1984). However, this amendment, by its own terms (§ 6), was prospective in application and was not intended to apply to Matthews or any other servicemember whose case had already been tried.

The death penalty procedure authorized by the President in January 1984 became RCM 1004 in the Manual for Courts-Martial, United States, 1984. When Congress amended the Uniform Code in 1985 by adding Article 106a – Espionage, and authorized the death penalty for this crime, RCM 1004 was amended to specify some additional "aggravating factors" for members of a court-martial to consider in deciding on a death penalty. § 1k(4), Exec. Order No. 12,550, 51 Fed.Reg. 6497, 6498 (1986).

We are now asked by appellant to reconsider our conclusion in *Matthews* that the President may constitutionally define the circumstances under which a death penalty may be imposed by a court-martial. Furthermore, appellant maintains that, in its present form, RCM 1004 is unconstitutional on its face.

III

A

RCM 1004, which is captioned "Capital cases," currently provides:

(a) *In general.* Death may be adjudged only when:

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war, and

(2) The accused was convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken; and

(3) The requirements of subsections (b) and (c) of this rule have been met.

(b) *Procedure.* In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—

(1) *Notice.* Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) *Evidence of aggravating factors.* Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.

(3) *Evidence in extenuation and mitigation.* The accused shall be given broad latitude to present evidence in extenuation and mitigation.

(4) *Necessary findings.* Death may not be adjudged unless—

(A) The members find that at least one of the aggravating factors under subsection (c) existed;

(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.

(5) *Basis for findings.* The findings in subsection (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(6) *Instructions.* In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) *Voting.* In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) *Announcement.* If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating factors under subsection (c) of this rule were found by the members.

(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118 or 120;

(2) That in committing the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under circumstances that the lives of persons other than the victim, if any, were unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 104, 106a, or 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(a):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constititution and laws of the United States,

any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil.R.Evid. 315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim;

(J) The accused has been found guilty in the same case of another violation of Article 118;

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing;

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim;

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;

(11) That, only in the case of a violation of Article 104 or 106a:

(A) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

For purposes of this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

(d) *Spying*. If the accused has been found guilty of spying under Article 106, subsections (a)(2), (b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

(e) *Other penalties*. Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal,

as appropriate. Confinement is a necessary incident of a sentence of death but not a part of it.

(Discussion omitted.)

B

[3,4] If "aggravating factors" used in channeling the discretion of the sentencing authority in death cases were elements of the crime, we would have no choice but to hold that they must be set forth by Congress and cannot be prescribed by the President. Consistent with Article I of the Constitution, only Congress has the power to legislate; and definition of the elements of a crime clearly is legislation. However, the Supreme Court has made clear that "aggravating factors" are not "elements" of a crime. *Cf. Walton v. Arizona*, 497 U.S. ____, ____ 110 S.Ct. 3047, 3054-55, 111 L.Ed.2d 511, 525 (1990). For this reason a defendant has no right to a jury trial as to the existence of aggravating factors, and the sentencer's rejection of a particular circumstance is not an "acquittal" of that circumstance for double jeopardy purposes. Cf. *Poland v. Arizona*. 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986).

[5] Is it consistent, then, with the separation of powers required by the Constitution for the President to prescribe these "aggravating factors"? The recent decision of the United States Supreme Court in *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), provides us with guidance.

There the Court considered the constitutionality of sentencing guidelines issued by the Sentencing Commission, which is chaired by a Federal circuit judge and has other judges among its members. The defendant complained that the commission and its guidelines were unconstitutional because promulgation of guidelines was a legislative task which should have been performed by Con-

gress and because "the separation of powers doctrine" was violated by allowing active members of the judiciary to serve on the commission. However, the Supreme Court concluded, over Justice Scalia's vigorous dissent, that establishment of the commission had not violated separation-of-powers requirements and that the guidelines had been constitutionally promulgated.[6]

In *Mistretta*, the Court seemed willing to allow considerable flexibility and innovativeness in the allocation of power among governmental institutions. Apparently its chief concern was that one branch of Government not aggrandize itself at the expense of another. However, in *Mistretta* this fear was allayed because Congress had established the Sentencing Commission and had defined the task which it wished the Commission to perform. A year before the Court took a similar tack in upholding legislation which provided for an Independent Counsel. *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

Unlike an Independent Counsel or members of the Sentencing Commission, the President holds an office specifically authorized by the Constitution. Moreover, he has been invested by the Constitution with the "executive Power," Art. II, § 1, and is the Commander in Chief of the Armed Forces. Art. II, § 2. In view of his inherent constitutional authority, a separation-of-powers objection has much less merit in the present context than if the "aggravating factors" for capital cases tried by courts-martial had been formulated by a specially created commission.

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[6] In footnote 11 of its opinion in *Mistretta*, the Supreme Court discussed the Sentencing Commission's authority with respect to the death penalty. 488 U.S. 361, 378, 109 S.Ct. 647, 657-58, 102 L.Ed.2d 714 (1989).

We are mindful, however, of the separation-of-powers analysis in Justice Jackson's often cited concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). There, in dealing with the seizure of steel mills during the Korean War, Justice Jackson suggested that the President's power is the greatest when he acts under a specific delegation from Congress; is less when he acts without delegation, but as to a subject concerning which Congress has not legislated; and is the least when he acts on the basis of his inherent constitutional authority and against the express or implied wishes of Congress. *See* 343 U.S. at 635-38, 72 S.Ct. at 870-72. Presidential power to prescribe the "aggravating factors" in RCM 1004 is more sustainable if it has been expressly or implicitly conferred by Congress, or if Congress, at least, has displayed no desire to legislate in this field and a willingness to let the President take action.

It is clear that Congress has been willing for the President to play the major role in determining what punishments may be imposed by courts-martial. Most of the punitive articles in the Uniform Code provide that a convicted accused "shall be punished as a court-martial may direct." Under Article 56, UCMJ, 10 USC § 856, "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." Article 18, UCMJ, 10 USC § 818, states that a general court-martial "may, *under such limitations as the President may prescribe*, adjudge any punishment not forbidden by [the Code], including the penalty of death when specifically authorized by" the Code. (Emphasis added.) When these Articles are taken together, they reveal that—instead of legislating maximum punishments as it has done in Title 18 of the United States Code for cases tried in the District Courts—Congress has decided that the President shall set the maximum punishments imposable in trials by courts-martial.

Consistent with Articles 18 and 56 of the Code—and previously with comparable provisions of the Articles of War—the President for several decades prescribed maximum punishments in a Table of Maximum Punishments as part of the Manual for Courts-Martial. The current Manual sets the maximum punishments in subparagraph e for each paragraph in Part IV devoted to a particular offense.[7] In some instances, this Table and now the Manual text provide that a maximum punishment is increased because of aggravating circumstances. For example, driving while drunk carries a heavier penalty if it results in death. Para. 35e(1), Part IV, 1984 Manual, *supra*. Desertion terminated by apprehension authorizes a higher maximum punishment than desertion terminated by surrender. Para. 9e(2). The maximum punishment for larceny depends on the value of the property stolen. Para. 46e(1). And so on.

Thus, under a power delegated by Congress, the President has for many years been prescribing aggravating circumstances that would increase the punishment imposable for various offenses tried by courts-martial. Presumably, Congress has been well aware of his exercise of this power because, under Article 36(b) of the Uniform Code, 10 USC § 836(b), the rules and regulations prescribed by the President for courts-martial—including, of course, the maximum punishments—must be reported to Congress.

Since 1951 death penalties have been authorized by several punitive articles of the Uniform Code, and previously they had been permitted by the Articles of War and the Articles for the Government of the Navy. Furthermore, Congress has never displayed any intent to rescind them.

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[7] Appendix 12 of the Manual lists maximum punishments, but it is not authoritative.

In 1983, when this Court decided *Matthews*, we held that either Congress or the President could prescribe "aggravating factors" for death cases in courts-martial. 16 MJ at 380-81. In view of our analysis in *Matthews*, it should have been apparent that, unless these aggravating factors were prescribed by one branch of government or the other, courts-martial would be precluded from adjudging death penalties.

When, after our *Matthews* decision the President prescribed a new sentencing procedure for death cases, his action was promulgated by Executive Order No. 12, 460, *supra*, which gave notice to Congress and the public at large. We are unaware of any indication of legislative displeasure with the President's action or any legislative effort at that time to undo his action or to curtail the use of capital punishment in courts-martial.

In 1985, Congress enacted legislation which we interpret to be an affirmation of presidential power to prescribe "aggravating factors" for capital cases. The Uniform Code was amended by the addition of Article 106a, which prohibited espionage and authorized punishment as a court-martial may direct." Art. 106a(a)(1). In connection with its death penalty, Article 106a provided:

> (b)(1) No persons may be sentenced by court-martial to suffer death for an offense under this section (article) unless—
>
> > (A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and
> >
> > (B) the members unanimously determine that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including the aggravating factors set out in subsection (c).

(2) Findings under this subsection may be based on—

(A) evidence introduced on the issue of guilt or innocence;

(B) evidence introduced during the sentencing proceeding; or

(C) all such evidence.

(3) The accused shall be given broad latitude to present matters in extenuation and mitigation.

(c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.

(2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.

(3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.

(4) *Any other factor that may be prescribed by the President by regulations under section 836 of this title (article 36).*

Pub.L. No. 99-145, title V, § 534(a), 99 Stat. 634 (1985) (emphasis added).

Two features of this legislation are noteworthy. First, the procedure prescribed by Article 106a conforms generally to the procedure which the President previously had prescribed in RCM 1004. Secondly, the President is specifically authorized by Article 106a(c)(4) to prescribe other "aggravating factors" in addition to the three that

are set forth in Article 106a(c)(1)-(3). This authority is linked in (c)(4) of that Article to the power granted him by Article 36(a) of the Uniform Code to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof," for trials by courts-martial.[8]

In connection with the provision for death-penalty sentence proceedings in Article 106a, H.R. Conference Report No. 235, 99th Cong., 1st Sess., states:

> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provision of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards *that already exist for the other capital punishment articles.*

DOD Authorization Act of 1986, Pub.L. No. 99-145, 1985 U.S. Code Cong. & Admin. News, 571, 579 (emphasis added). If failure of Congress to complain about the content of regulations can be construed to be ratification, *cf. Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, AFL-CIO*, 367 U.S. 396, 408-09, 81 S.Ct. 1529, 1535-36, 6 L.Ed.2d. 924 (1961), the provisions of Article 106a—along with its legislative history—are even clearer evidence of ratification.

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[8] Under Article 36(b), UCMJ, 10 USC § 836(b), the rules and regulations promulgated under Article 36(a) "shall be reported to Congress."

As heretofore mentioned, the Supreme Court has made clear its concern that one branch of government not grab any power which the Constitution has conferred on another branch. *Cf. Mistretta* and *Morrison*, both *supra*; *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986). By implication Article 106a affirms that Congress does not consider the President's prescribing "aggravating factors" to be in diminution of its own legislative power. Instead, Congress undoubtedly has concluded that, in view of the major role that for decades it has delegated to the President in prescribing limitations on maximum punishment, it is better for the President to prescribe "aggravating factors" by Executive Order than for Congress to attempt to do so by statute.[9]

C

To the extent we rely on delegation from Congress as a source of presidential power, we are confronted by appellant's argument that Congress failed to prescribe standards for the exercise of the delegated power. *Cf. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935). Certainly Congress did not give the President guidance as explicit as that which the Sentencing Reform Act prescribed for the Sentencing Commission. Indeed, Justice Scalia, the sole dissenter in *Mistretta*, perceived no delegation problem in the creation of that Commission and was

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[9] Since we conclude that Congress has—at least, implicitly—delegated this task to the President, we need not consider what inherent authority the President would have in this area. For example, absent any indication of congressional willingness for him to prescribe "aggravating factors," could the President constitutionally do so? Also, what if Congress attempted to block exercise of this power by the President?

concerned chiefly with the claimed violation of separation-of-powers principles.

However, in prescribing "aggravating factors" the President was not left totally without guidance from Congress. Article 106a(c)(4) refers to regulations prescribed by the President under Article 36—which, in turn, directs that the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with" the Uniform Code. *See* Art. 36(a). Apparently Congress wished the President to look to the "principles of law" applied in federal criminal cases in determining what should be the "aggravating factors" for capital cases tried by court-martial. Furthermore, as we examine the "aggravating factors" prescribed by the President in RCM 1004, we find that they reflect policy expressed by Congress in various statutes—including several punitive articles of the Uniform Code of Military Justice—and also conform generally with the Model Penal Code and with policies expressed in the statutes of many of the 36 states which authorize the death penalty.[10]

"Aggravating factor" (1) is commission of the offense "before or in the presence of the enemy." Article 99 of the Code, 10 USC § 899, authorizes death for nine types of misbehavior "before or in the presence of the enemy," and thereby it reflects a legislative judgment that such conduct is very harmful to the military mission.

"Aggravating factor" (2)(A) corresponds to an "aggravating factor" prescribed by Congress for espionage offenses, *see* Art. 106a(c)(2); and "Aggravating factors" (2)(B) and (3) also correlate with the manifest congression-

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[10] *See Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 2975 n.2, 2976 n.4, 2978 n.5, 106 L.Ed.2d 306 (1989), for a collection of federal and state statutes concerning the death penalty.

al concern about espionage—a crime for which death is authorized by Article 106a(a)(1) of the Code. *See also* 18 USC § 794.

"Aggravating factor" (4) parallels an "aggravating factor" prescribed by Article 106a(c)(3) and reflects special concern if the crime for which the accused has been convicted created a grave risk of death to others. This "aggravating factor" has parallels in many state statutes authorizing the death penalty.[11]

"Aggravating factor" (5)—which involves commission of the offense "with the intent to avoid hazardous duty"—reflects legislative disapproval of flight from hazardous duty. Thus, desertion with intent to avoid hazardous duty authorizes the death penalty in time of war, *see* Art. 85(a)(2) and (c); and running away from the enemy or cowardly conduct also permits a death penalty, *see* Art. 99(1) or (5).

"Aggravating factor" (6)—which applies to murders and rapes in time of war—deals with conduct which violates the law of war; and thereby threatens international relations. The death penalty is not unusual for violations of the law of war; *see e.g., In re Yamashita*, 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946)[12], *Ex Parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.ED.3 (1942); and perhaps the constitutional restrictions derived from *Furman* may not even apply to such violations. *Cf. Yamashita* and *Quirin*.

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[11] *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246, 260 (1988); *Jones v. State*, 520 So.2d 543, 551-52 (Ala. 1988); *Stouffer v. State*, 738 P.2d 1349, 1361 (Okl.Cr. 1987); *Hogan v. State*, 103 Nev. 21, 732 P.2d 422, 424 (1987); *Way v. State*, 496 So.2d 126, 128 (Fla. 1986).

[12] Article 106, UCMJ, 10 USC § 906, which is based on the law of war, applies not only to servicemembers but also to civilians. Whether its mandatory death penalty is constitutional is open to question. *Cf. Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

"Aggravating factor" (7)—applies only to premeditated murder in violation of Article 118(1) and is the only "aggravating factor" involved in appellant's case. This "aggravating factor" has ten subparts. As explained in the Drafter's Analysis of this rule, *see* Manual for Courts-Martial, United States, 1984, at A21-66 (Change 2), these "aggravating factors" were to a considerable extent derived from those contained in the state statutes enacted in response to *Furman v. Georgia, supra.*

Factor (7)(A) applies to an accused "serving a sentence of confinement for 30 years or more or for life at the time of the murder." This factor is intended to express disapproval of premeditated murder by an accused who has already been convicted of a very serious crime. Also, it may provide an additional deterrent for someone who might only be deterred by the death penalty.

Factor (7)(B) is that the premeditated murder occurred "while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense."

Congress has severely condemned all of these crimes. Under Article 118(4), murder committed in the course of "burglary, sodomy, rape, robbery, or aggravated arson" permits a death sentence and requires at least life imprisonment. Mutiny and sedition are themselves capital offenses under Article 94. Piracy long has been viewed as a universal offense against the law of nations and is specifically mentioned in Article I, § 8 cl. 10 of the Constitution. Congress has prescribed the death penalty for skyjacking under certain circumstances—49 USC App § 147s(i)(1)(B) (aircraft piracy resulting in death

penalty).[13] Kidnapping also is severely condemned by the Federal criminal code, 18 USC § 1201(a)—although the death penalty, which at one time Congress authorized for this crime, was subsequently held unconstitutional in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

Factors (7)(C), (7)(D), and (7)(E)—which involve, respectively, murder "for the purpose of receiving" something of value, "procur[ing] another . . . to commit the murder," or committing the murder "to avoid or to prevent lawful apprehension or effect an escape"—have counterparts in many state statutes. *See, e.g., Ariz. Rev. Stat. Ann.* 13-703(F)(5) (Supp.1988) (which includes as a factor that the homicide was committed with the expectation of receiving something of value); *see also Walton v. Arizona*, —U.S.—, 110 S.Ct. 3047, 3051, 111 L.Ed.2d 511 (1990). Of course, resistance of apprehension and escape are offenses under the Uniform Code. *See* Art. 95, 10 USC § 895.

"Aggravating factor" (7)(F)—concerns the official status or duties of the victim, and it corresponds with recent legislation seeking to protect various public officials. *See, e.g.*, 18 USC §§ 351 and 1751.

Factor (7)(G) centers on the victim's execution of his military office or his duties, military or civilian, in law enforcement, security, or firefighting. At least to some extent, this "aggravating factor" recognizes a congressional intent to protect persons performing duties important to public safety. *Cf.* 18 USC § 1114; Arts. 90 and 91, UCMJ, 10 USC §§ 890 and 891, respectively.

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[13] Whether the authorized penalty of death if the death of another person occurs as a result of the air piracy is constitutionally sustainable may be questioned since the statute requires no specific findings of aggravation and specifies no aggravating factors.

"Aggravating factor" (7)(H) concerns "intent to obstruct justice." Obstruction of justice is a recognized federal crime. 18 USC §§ 1501-15. In military practice obstruction or interference with the administration of justice is not limited to those acts enumerated in the federal criminal code—*United States v. Jones,* 20 MJ 38, 40 (CMA 1985); *United States v. Long,* 2 USCMA 60, 6 CMR 60 (1952); but under the facts here we need not decide which definition should be applied to the act alleged to have aggravated the offense.

"Aggravating factor" (7)(I) resembles an "aggravating factor" in many state statutes for murders described as "heinous, atrocious, or cruel" or in similar terms. However, unlike the state statues—which have sometimes been successfully attacked as vague—*see Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); and have required limiting judicial construction, *cf. Walton v. Arizona, supra*—this "aggravating factor" is stated clearly in RCM 1004.

"Aggravating factor" (7)(J) is "another violation of Article 118"—*i.e.,* another murder—"in the same case." Since any violation of Article 118 has a maximum punishment either of death or of life imprisonment, this "aggravating factor" is predicated on conduct viewed quite seriously by Congress. Likewise, in many state statutes, a second murder is an "aggravating factor."[14]

"Aggravating factor" (8) applies only in the case of a violation of Article 118(4), and so relates only to felony murders. We have held that an accused may be convicted

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[14] *See Townsend v. State,* 533 N.E.2d 1215, 1229 (Ind. 1989); *Wallace v. State,* 486 N.E.2d 445, 463 (Ind. 1985); *Hightower v. State,* 259 Ga. 770, 386 S.E.2d 509, 511 (1989); *State v. Sloan,* 756 S.W.2d 503, 509, 511 (Mo. banc 1988).

of murder under Article 118(4) even though he did not kill the victim and only aided and abetted commission of the felony on which the felony-murder conviction was based. *United States v. Jefferson,* 22 MJ 315 (CMA 1986). The Supreme Court has concluded that the Eighth Amendment is violated when a defendant is sentenced to death for a felony murder if he did not participate actively in the killing. *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *but cf. Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (upholding a death penalty for an accused who did not kill the victim, but whose conduct was related to the killing).

"Aggravating factor" (9) applies only to a violation of Article 120—which authorizes a death penalty for rape. In *Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2nd 982 (1977), the Supreme Court held that executing a defendant for rape of an adult female would violate the Eighth Amendment. We intimated in *Matthews* that this same principle would apply to trials by courts-martial, "at least, where there is no purpose unique to the military mission that would be served by allowing the death penalty for this offense." 16 MJ at 380.

This "factor" seeks to comply with *Coker* by permitting the death penalty only if "[t]he victim was under the age of 12" or if "[t]he accused maimed or attempted to kill the victim." Congress has manifested its intent that young females be protected from sexual intercourse by creating the offense of carnal knowledge, whereunder a servicemember may be punished for consensual intercourse with a female under 16. Also, Congress has prohibited both maiming, *see* Art. 124, UCMJ, 10 USC § 924, and attempted murder, *see* Art. 80, UCMJ, 10 USC § 880, and Art. 118.

"Aggravating factor" (10) applies to conduct for which "death is authorized under the law of war." The law of war—which is part of the "Law of Nations" within the

meaning of Article I, § 8, cl. 10 of the Constitution—provides a separate basis of military jurisdiction from that which exists under Article I, § 8, cl. 14, on which the Uniform Code is based. *In re Yamashita* and *Ex Parte Quirin,* both *supra.* Violations of the law of war may be tried by general court-martial, *see* Art. 18, or by a military commission or some other type of military tribunal. *Cf.* Arts. 104 and 106, UCMJ, 10 USC § 904 and 906, respectively; *In re Yamashita* and *Ex Parte Quirin,* both *supra; Madsden v. Kinsella,* 343 U.S. 341, 72 S.Ct. 699, 96 L.Ed. 988 (1952). If the line of decisions beginning with *Furman v. Georgia, supra,* applies to violations of the law of war and if an aggravating factor must be established to permit imposition of the death penalty for those violations, it seems appropriate that one "aggravating factor" should be that the law of war recognizes the seriousness of the conduct involved by authorizing the punishment of death.[15]

"Aggravating factor" (11) applies only to violations of Article 104—aiding the enemy—or of Article 106a—espionage. The first alternative is that "[t]he accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute." Here again, aggravation is found in conduct which Congress has condemned by authorizing punishment of death or life imprisonment.

The other alternative is based on the language of Article 106a(c)(3), whereunder an aggravating factor for the offense of espionage is that "the accused knowingly created a grave risk of death to another person."[16]

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[15] Article 18, UCMJ, 10 USC § 818, authorizes either general courts-martial or other military tribunals to administer the law of war.

[16] Indeed, the language used in the Rule, which adverts to "grave risk of death to a person other than the individual who was the

From our examination of the "aggravating factors" formulated by the President in RCM 1004, it seems clear that, to a considerable extent the President acted in reliance on legislative policy expressed in the Uniform Code of Military Justice and in other federal statutes. This is especially true with respect to "aggravating factor" (7) and its various subparts—which were utilized in adjudging the death penalty in the present case. To the extent the President went outside federal statutes for guidance, he drew upon the Model Penal Code—which has been a source of decisional guidance in military justice, *see, e.g., United States v. Byrd,* 24 MJ 286 (CMA 1987); *United States v. Frederick,* 3 MJ 230 (CMA 1977); *United States v. Thomas,* 13 USCMA 278, 32 CMR 278 (1962)—and upon patterns discerned in state death-penalty legislation.

We note also that RCM 1004 is more specific in prescribing aggravating factors than is true of many state statutes. It does not use terms like "heinous," "vile," "atrocious," and "cruel"—which present issues of vagueness and necessitate extensive judicial construction. *See, e.g. Walton v. Arizona, Maynard v. Cartwright,* and *Godfrey v. Georgia,* all *supra.* Thus, the "aggravating factors" under RCM 1004 are easier to apply than some civilian counterparts.

As has already been emphasized, the "aggravating factors" which President Reagan prescribed in January 1984

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victim," seems to suggest that, in order for this aggravating factor to apply, the accused not only must have been convicted of aiding the enemy or espionage, but also must have killed one person "who was the victim" and placed in great danger someone else. We doubt that this additional restriction was intended. Nevertheless, since, in describing this "aggravating factor," the President did not use the language, "the victim, if any"—as he did for "aggravating factor" (4)—"aggravating factor" (11)(B) must contemplate a "victim" apart from the person placed at risk.

and which were incorporated in Manual for Courts-Martial, United States, 1984, were known to Congress. In enacting Article 106a in 1985, Congress specifically authorized the President to prescribe "aggravating factors" for espionage prosecutions in addition to those prescribed by Congress. Art, 106a(c)(4). We interpret this express congressional delegation to signify approval of the standards which the President theretofore had employed in prescribing "aggravating factors" for use in capital cases. RCM 1004(c).

Although the guidance provided by Congress to the President was not so specific as that which Congress gave to the Sentencing Commission, *see Mistretta v. United States, supra,* the President was not set adrift in an uncharted sea. Instead, in prescribing "aggravating factors," he was guided by the Uniform Code and other federal legislation and by a pattern of legislative intent discernible in the state statutes. Moreover, Congress not only acquiesced in his performance of this task but also tacitly ratified the "aggravating factors" when it enacted Article 106a of the Uniform Code.

IV

[6] Appellant has vigorously attacked the constitutionality of RCM 1004, as promulgated by the President. He claims that the Rule should require the court-martial to have at least 12 members at all times.[17] Appellant recognizes that courts-martial are not subject to the jury-trial requirements of the Sixth Amendment, *see Ex parte Quirin,* 317 U.S. at 39-45, 63 S.Ct. at 16-19; but he reasons that to allow a death penalty to be imposed by less

[17] In appellant's case, there were originally 15 members of the court-martial, but after challenges, the number was reduced to 9.

than 12 members violates the Eighth Amendment. His premise is that, even though juries in state courts are not required constitutionally to have 12 members, *see Williams v. Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), those states in which juries do participate in imposing the death penalty use 12-member juries for this task. Moreover, the Supreme Court has recognized that the number of jurors is related somewhat to the reliability of their decision, and therefore no state jury may be reduced below 6 in number without violating due process. *Ballew v. Georgia,* 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978). Appellant claims that, if there are at least 12 court-martial members, there will be an input of diverse viewpoints, so that any decision on imposing capital punishment is less likely to be arbitrary or capricious.

The defense concedes that a civilian judge alone may be entrusted with imposing the death sentence, *Clemons v. Mississippi,* 494 U.S. ____, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); *Walton v. Arizona, supra;* and he may even be empowered to override a jury recommendation for life imprisonment. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). However, appellant points out that a judge has a professional background which qualifies him for his sentencing task, while court-martial members lack similar experience.

Under RCM 1004, the court-martial members—who have been chosen pursuant to the criteria set forth in Article 25 of the Code, 10 USC § 825—must be unanimous in finding aggravating factors.[18] The military judge can, at least, recommend a commutation of a death sentence

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[18] Unanimity is not always required by state law. *See Jackson v. State,* 530 So.2d 269, 271 (Fla. 1988)—the vote to recommend the death penalty was 7-5; *Parker v. State,* 476 So.2d 134 (Fla. 1985)—the vote was 8-4.

adjudged;[19] and the convening authority is empowered to commute the sentence. Furthermore, a Court of Military Review, composed of trained appellate military judges, must thoroughly review the law, the facts, and the appropriateness of the accused's sentence. In view of all these safeguards, we are not convinced that a court-martial must have 12 members in a capital case when this is not required in any other type of trial.

Under RCM 1004, the members must unanimously find at least one of the listed aggravating factors. Unlike the procedure under some state statutes upheld by the Supreme Court, *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), there is no "aggravating factor" which *compels* the sentencing authority to impose the death sentence.[20] Instead, all the court-martial members must "concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances . . . including the factors under" RCM 1004(c). RCM 1004(b)(4)(C).

The defense seems to complain that RCM 1004 does not prescribe any mitigating factors to be found by the members of the court-martial. However, by omitting provision for such findings, this rule avoids the problem posed in *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and in *McKoy v. North Carolina,* 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). There the instructions of the trial judge were construed by the Supreme Court to mean that a mitigating factor could

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[19] We need not decide now whether the military judge is himself empowered to set aside a death sentence that he considers disproportionate or otherwise defective.

[20] If the President had attempted to require that a death sentence be adjudged if an "aggravating factor" were found, we believe he would clearly have exceeded his constitutional authority.

not be considered at all unless all the jurors concurred in finding that it existed. Thus, such an instruction might enable a juror who wanted the death penalty imposed to hold out against any findings that mitigrating factors existed. Instead, RCM 1004 allows an accused broad leeway to bring to the attention of the court-martial members any information which he believes would mitigate his sentence. *Cf. Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

[7,8] Appellant has contended that RCM 1004 is defective because it lacks any provision to prevent racial bias—like that included in a recently enacted federal anti-drug statute. Section 848*(o)* of Title 21, USC, requires that, in a drug case where the death penalty is authorized, the jury be instructed not to "consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim." This statute did not become effective until after appellant's trail (102 Stat. 4545) and, by its own terms, applies only to jury trials in federal district courts. Its requirements—however desirable they may be[21]—are not constitutionally mandated; otherwise, the Supreme Court would have applied them to capital cases tried by state courts.[22]

Appellant contends that court-martial members would be misled by the sentencing procedure, because they must find "any aggravating factors" but they do not make

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[21] The military judge could give such instructions *sua sponte* or if requested by the defense. Such an instruction certainly seems desirable.

[22] Curtis, who is black, was tried by a panel which included several blacks. Despite his claim that he had killed Lieutenant Lotz in a rage provoked by the victim's racial prejudice, the members voted unanimously for the death penalty.

findings as to "mitigating factors." His assumption is that, if one or more "aggravating factors" are found and no "mitigating factors" are specifically found, the members will inevitably conclude that the "aggravating factors" substantially outweight the "mitigating factors." Under this view, the President's attempt to allow the members the maximum leeway to consider mitigating evidence—in compliance with the principles announced in *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Lockett v. Ohio, supra*—is deemed to be a vice rather than a virtue. While there might be some advantages in the procedure urged by the defense for finding mitigating factors, there also can be disadvantages—as evidenced by *McKoy v. North Carolina* and *Mills v. Maryland,* both *supra.* We believe that the President made a constitutionally permissible choice.

[9] The defense insists that RCM 1004 should require a separate finding by the members that "any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances." We are convinced, however, that the weighing of aggravating against mitigating factors can be adequately handled by instructions to the members that they must all concur as to this imbalance and does not require a separate finding. *United States v. Evans,* 27 MJ 34, 40 (CMA 1988), *cert. denied,* 488 U.S. 1011, 109 S.Ct. 797, 102 L.Ed.2d 788 (1989). Such instructions were given here.

In sum, as we construe RCM 1004, it not only complies with due process requirements but also probably goes further than most state statutes in providing safeguards for the accused.

V

This case provides an example of matters that must be considered during appellate review before a death sentence

can be approved. Here, one of the "aggravating factors" found by the court-martial was that Mrs. Lotz had been killed by appellant in the perpetration of a burglary. However, two other "aggravating factors" were submitted to the members. Specifically, the members found:

> PRES: Lance Corporal Ronnie A. Curtis, United States Marine Corps, this court-martial finds that the following aggravating factors have been proven beyond a reasonable doubt:
>
> That with regard to the premeditated murder of Mrs. Joan M. Lotz, the premeditated murder of her was committed while the accused, Lance Corporal Ronnie A. Curtis, U.S. Marine Corps, was engaged in the commission of a burglary;
>
> That with regard to the premeditated murder of Mrs. Joan M. Lotz, that the accused, Lance Corporal Ronnie A. Curtis, has been found guilty in the same case of another murder, to wit: That of Lieutenant James F. Lotz, United States Marine Corps Reserve, in violation of Article 118, Uniform Code of Military Justice; and
>
> That with regard to the premeditated murder of Lieutenant James F. Lotz, U.S. Marine Corps Reserve, the accused, Lance Corporal Ronnie A. Curtis, U.S. Marine Corps, has been found guilty in the same case of another murder, to wit: that of Mrs. Joan M. Lotz, in violation of Article 118, Uniform Code of Military Justice.

[10] Either of these latter two "factors" meet the criteria of RCM 1004(c)(7)(J): "The accused has been found guilty in the *same case* of another violation of Article 118; . . . ." (Emphasis added.) There is some authority to the effect that the separate findings as to these two "factors" might represent a double counting of "aggravating factors"; and

hence, one of the findings might need to be vacated. *People v. Harris,* 36 Cal.3d 36, 201 Cal.Rptr. 782, 801, 679 P.2d 433, 452 (1984), *cert. denied,* 469 U.S. 965, 105 S.Ct. 365, 83 L.Ed.2d 301 (1984); *Wilson v. State,* 300 S.E.2d 640, 648, (Ga.), *cert. denied,* 464 U.S. 865, 104 S.Ct. 199, 78 L.Ed.2d 174 (1983); *State v. Goodman,* 257 S.E.2d 569 (NC 1979). We leave open this issue for consideration during further proceedings in this case. However, we observe that setting aside one "aggravating factor" where others remain does not mandate vacating the death sentence. *Clemons v. Mississippi, supra.* If it is decided hereafter that only two—rather than three—"aggravating factors" should have been found by the court-martial, then it will be necessary for the Court of Military Review to determine whether the death sentence would have been adjudged at trial if only two "factors" had been found. *Cf. United States v. Sales,* 22 MJ 305 (CMA 1986); *United States v. Suzuki,* 20 MJ 248 (CMA 1985).

Article 66(c) UCMJ, 10 USC § 866(c), provides that, "[i]n a case referred to it, the Court of Military Review . . . may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, *as it finds correct in law and fact* and determines, *on the basis of the entire record,* should be approved." (Emphasis added.) This extensive appellate review, which includes review of appropriateness of sentence, seems unique to military justice. However, many states provide for review of death sentences—usually referred to as a "proportionality review." *See, e.g., Gregg v. Georgia, supra,* 428 U.S. 153, 96 S.Ct. 2909.

[11] This review is not constitutionally required in civilian cases where the statutory procedures adequately direct the sentencing authority's exercise of discretion. *See, e.g., McCleskey v. Kemp,* 481 U.S. 279, 306, 107 S.Ct. 871, 1756, 1774, 95 L.Ed.2d 262, 288 (1987); *Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 79 L.Ed.2d 29 (1984). In

view of the safeguards prescribed by RCM 1004, we are convinced that a "proportionality review" is not required by the Eighth Amendment, which prohibits "cruel and unusual punishments," or by Article 55, 10 USC § 855, which prohibits "cruel or unusual punishments." However, we conclude that such a review is encompassed within the responsibility for determining appropriateness of sentence under Article 66 of the Code. Likewise, in the unique context of the death penalty, we believe that Congress intended for our Court to oversee this review in order to assure that it is properly performed.

In Solem v. Helm, 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637, 650 (1983), the Supreme Court stated:

> In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

[12] With this guidance in mind, we conclude that proportionality review *need not* be limited to death sentences from the accused's own Service or even to death sentences imposed by courts-martial.[23]

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[23] An interesting South Carolina case deals with a proportionality review of a death sentence where there had been no prior death sentences in that jurisdiction that could be used for comparison. *See State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799, 807 (1979):

> We have compared the death sentences imposed upon appellants with the sentences imposed in all prior capital cases tried under the current death penalty statutes and are satisfied that there are no similar cases against which the proportionality of the sentences imposed upon appellants can be measured.
>
> The inability of this Court to compare this case with any other similar cases does not require, however, that appellants' sentences

[13] Accordingly, before a death sentence adjudged by a court-martial can be approved, the Court of Military Review must determine: (a) whether one or more valid aggravating factors have been unanimously found by the court-martial and this finding is factually and legally correct; (b) if any corrective action results in setting aside any such finding but leaves intact at least one "aggravating factor," whether this error affected imposition of the sentence; (c) whether the death sentence adjudged is proportionate to other death sentences that have been imposed; and (d) whether under all of the facts and circumstances of the case the death sentence is appropriate, Art. 66(c).

VI

We shall set this case for further argument to dispose of the remaining questions which have been raised by the defense. After deciding them, we shall issue our mandate.

SULLIVAN, Chief Judge (concurring):

I concur with the scholarly and excellent opinion of Senior Judge Everett concerning the constitutionality of RCM 1004, Manual for Courts-Martial, United States, 1984. However, I reserve judgment on the effect of Article 66, Uniform Code of Military Justice, 10 USC § 866, on

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be set aside. Any system of review that requires a comparison of each case with all similar prior cases must have a beginning. There will be a first case for each type or category of capital case that may appear and that first case necessarily cannot be compared to any other similar cases. The first case must stand alone, otherwise comparative sentence review would be forever impossible.

(Footnote omitted.)

This was the first capital punishment case reviewed in South Carolina under death penalty statutes revised after *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

this case since such a holding is not required to answer the specified issues decided today.

It is my personal view, however, that, in peacetime, a servicemember in a capital case should be tried by a 12-member court-martial. The value of a soldier's life is surely equal to the value of life of his fellow citizens. *Cf. Williams v. Florida,* 399 U.S. 78, 103, 90 S.Ct. 1893, 1907, 26 L.Ed.2d 446 (1970). Nevertheless, neither the Constitution itself, nor Congress in legislation, nor the President by regulation has mandated a 12-member panel in a military capital case. *See generally* Van Loan, *The Jury, The Court-Martial, and The Constitution,* 57 Cornell L. Rev. 363, 384 n.118 (1972). Moreoever, it is the duty of this Court to apply the law of the land, not to legislate by judicial fiat, and therefore, it is beyond our power to mandate such a procedure. Finally, appellant himself, by use of his challenges, reduced in part the number of court members detailed to this case from 15 to 9. Moreover, he did not particularly object to trial by 9 members at this court-martial or request the detail of additional members. I could not find reversible error in these circumstances even if appellant was somehow entitled to a 12-member panel.

COX, Judge (concurring):

I concur with the resolution of the specified issues before us. I write only to reserve judgment on some other matters discussed by Senior Judge Everett which are used to illustrate the rationale of his decision.

APPENDIX B

UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

No. 63,044
NMCM 87-3856

UNITED STATES, APPELLEE,

v.

RONNIE A. CURTIS, LANCE CORPORAL,
U.S. MARINE CORPS, APPELLANT

Sentence Adjudged 6 Aug. 1987
Decided 30 June, 1989

Before the Court En Banc.

STRICKLAND, Judge:

Appellant was tried at Camp Lejeune, North Carolina, by a general court-martial composed of officer and enlisted members. Contrary to his pleas, he was found guilty of two premeditated murders, larceny, burglary, unlawful entry, indecent assault and damage to Government property in violation of Articles 118, 121, 129, 130, 134 and 108, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 918, 921, 929, 930, 934, and 908, respectively. Additionally, in accordance with his plea, he was convicted of disobeying a general order in violation of Article 92, UCMJ, 10 U.S.C. § 892. On August 6, 1987, Lance Corporal Curtis was sentenced to death. The convening authority approved the sentence as adjudged.

We determined that this case presented issues of exceptional importance and, thus, pursuant to Rule 17, Courts of Military Review Rules of Practice and Procedure, decided to hear this case *en banc*.

Appellant raises seven allegations of legal error on appeal. We have carefully considered each assignment of error in this capital case and will discuss each *seriatim*. Having reviewed the record pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866, we conclude that the assignments of error have no merit and that no prejudicial error was committed which affects the findings or sentence.

I

STATEMENT OF FACTS

Appellant, Lance Corporal Ronnie A. Curtis, reported to 3d Battalion, 2d Marines, 2d Marine Division, Camp Lejeune, North Carolina, in January 1985 and was assigned duties as a supply administrative clerk. His officer-in-charge was First Lieutenant James F. Lotz, the battalion supply officer. With the exception of an overseas deployment, Curtis and Lieutenant Lotz worked together in the same office for the next two years.

During this time period, Curtis visited Lieutenant Lotz's quarters aboard Camp Lejeune on several occasions; once for a supply section barbecue and on other occasions to pick up or deliver items related to supply work. As a result, Curtis learned the specific location of Lotz's quarters and, in addition, met Lieutenant Lotz's wife, Joan, who was a school teacher at the high school aboard the base.

Also during this time frame, Curtis, who is black, formed the perception that Lieutenant Lotz was racially prejudiced. This was apparently the result of certain nicknames used by Lotz such as "Bebop Curtis" and "Curtis Blow"; certain imitations of blacks done by Lotz, and,

what Curtis perceived to be a different attitude toward and treatment of black Marines in the office. Curtis' perception of prejudice was flatly refuted by black friends and acquaintances of Lotz, including a young black man who lived with the Lotzs and was treated like a son. Nevertheless, it was this perception which apparently led Curtis to the events of April 13 and 14, 1987.[1]

April 13, 1987, was a normal day in the supply section with Curtis going to work at 0730 hours as usual. Lieutenant Lotz was not in the office on this particular day, either in the morning or in the afternoon. Curtis got off work at 1630 hours and proceeded to his barracks room where he and his roommate listened to music for the next several hours. They then purchased a bottle of gin and continued to listen to music and drink mixed drinks for several more hours. During this time, Curtis consumed approximately one pint of gin.

According to Curtis' confessions and testimony, he then went for a walk and began thinking of the things that had been going on in the office and began thinking about Lieutenant Lotz picking on him. As he stood outside of the supply building where he worked, Curtis decided that he needed to kill his officer-in-charge.

Curtis determined he would use a knife to carry out his plan and he broke into the supply building, picked the lock on the security cage and stole a Marine Corps K-Bar knife (a large knife with a seven inch blade). Prior to leaving he

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[1] Whether this perception was the actual or only motive for these killings is subject to question. For example, on the night of the murders, Curtis complained to his roommate that Lotz had recently forbidden office personnel from playing games on the office computers, a practice that had previously been tolerated. He expressed his displeasure over this and it may explain the fact that while Curtis was stealing the knife from the supply building he threw his office computer to the floor.

damaged the office computer by throwing it on the floor. Next, he went back to his barracks room and obtained a pair of gloves so that he would not leave any fingerprints at the Lotz house. Curtis then stole a bicycle for transportation and, while riding the 1.5 miles to the Lotz home, devised a scheme that he knew would get him inside the house.

Curtis arrived at the Lotz home sometime after midnight. He carried the knife concealed in the waistband of his pants. He left the bicycle in the backyard and went to the front door and knocked. Within minutes, Lieutenant Lotz appeared at the door. Curtis acted anxious and told Lotz that another Marine member of the supply section had been in an automobile accident and needed help. Lotz immediately asked Curtis inside and prepared to call the military police. As Lieutenant Lotz picked up the phone to assist one of his Marines whom he believed to be injured, Curtis withdrew the K-Bar from his waistband and stabbed the Lieutenant in the chest. Lieutenant Lotz tried to place a chair between himself and Curtis and called to his wife. Curtis then stabbed Lotz a second time in the back.

Within moments Joan Lotz emerged from the bedroom with a blanket wrapped around her. She first went to her dying husband and then confronted Curtis, kicking him in the shin with her bare foot and asking what they had ever done to him. Curtis then began to attack Mrs. Lotz. As she pleaded with him to stop, he stabbed her seven times in the head, neck and back. Then, as she lay on the floor dying, Curtis ripped and cut off her panties and fondled her vaginal area.

Curtis then searched the house to determine if any other persons were present with the intent that he would kill anyone he found. He rummaged through the house taking car keys and money for gas. He wiped clean the knife he had

used in the killings and left the house, taking one of the Lotzs' cars. This car, however, had a standard transmission and Curtis had difficulty driving it so he returned to the crime scene. He thereupon reentered the Lotz home, found some additional money, checked both bodies and left a second time taking their other car.

He drove around aimlessly for some period of time and ultimately decided to leave town. As he was traveling down the highway, Curtis momentarily fell asleep at the wheel and ended up crashing in the ditch. The state police arrived and, in the course of the accident investigation, Curtis admitted killing the Lotzs. He subsequently made several other confessions to these crimes.

II

MILITARY JUDGE'S INSTRUCTIONS

[1, 2] Appellant's first assignment of error is that the military judge improperly instructed the members as to the voting procedures they had to utilize to adjudge the death penalty. The military judge instructed the members that two votes were required in order to adjudge the death penalty. He instructed that, first, they must unanimously find at least one of the aggravating factors existed beyond a reasonable doubt and, second, they must unanimously find the death penalty to be the appropriate sentence. Appellant argues that, in addition, the members should have been instructed to vote and unanimously find that any extenuating or mitigating circumstances were substantially outweighed by any aggravating factors. This error is without merit because we find that the military judge properly instructed the members in accordance with the requirements of Rule for Courts-Martial (R.C.M.) 1004, Manual for Courts-Martial (MCM), United States, 1984.[2]

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[2]The appellant does not challenge R.C.M. 1004, MCM, 1984, as a Constitutionally impermissible capital sentencing scheme. In our

This assigned error arises as a result of the wording in R.C.M. 1004(b)(4), MCM, 1984, which states:

> *Necessary findings.* Death may not be adjudged unless—
>
> (A) The members find that at least one of the aggravating factors under subsection (c) existed;
>
> (B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and
>
> (C) *All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances* admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule. (Emphasis added.)

Appellant asserts that in order for "all members [to] concur" as required by subsection (C), there must first be a vote in which all members unanimously find that the extenuating or mitigating circumstances are substantially outweighed by the aggravating circumstances. At trial, this same argument was made and the military judge, in denying appellant's request for this additional vote, indicated that "he [was] obligated to follow the procedures as set forth by the President." The military judge's ruling that

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review of this case, we are satisfied that R.C.M. 1004, MCM, 1984, comports with the mandates of the Supreme Court that the members be required to make "an individualized determination on the basis of the character of the [accused] and the circumstances of the crime" and that the members "adequately differentiated this case in an objective, evenhanded, and substantively rational way" before imposing the death penalty. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

this additional vote was not required is supported by the plain language of R.C.M. 1004(b)(7):

> *Voting.* In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

[3] This subsection requires that only two votes be taken by the members and not the three requested by appellant. The last sentence of this subsection clearly speaks of the aggravating factor determination vote being followed by the sentence determination vote with no discussion or provision for an intermediate vote.

The absence of a requirement for a vote as to the balancing test does not relieve the members of their obligation to perform this test, it merely does not require that they memorialize the specific result. Appellant argues that without such memorialization there is no way to determine if all the members concurred that any extenuating or mitigating circumstances were substantially outweighed by any aggravating factors. We do not agree.

R.C.M. 1004(b)(6) requires that the military judge instruct the members as to the "requirements and procedures" they must use to adjudge a death sentence, including instructions regarding the balancing test. We believe the military judge's instructions were in compliance with this provision. In his instructions, the military judge outlined a three-step procedure to be followed before a death sentence could be adjudged. These involved a determination

of whether an aggravating factor existed, application of the balancing test and a consideration of whether death was appropriate. With respect to step two the judge instructed, in pertinent part:

> . . . [y]ou may not adjudge a sentence of death *unless* you find that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating factors as you have found existed in the first step of this procedure. (Emphasis added.)

The military judge thereafter instructed with respect to step three: "A sentence of death may be adjudged only upon the unanimous fote of all the members."

In following the judge's instructions (given orally, with written copies provided to the members), the members could only have voted for death after first finding that the extenuating or mitigating circumstances were substantially outweighed by any aggravating circumstances. Thus, it is implicit in the recorded, unanimous vote for the death penalty that each member properly applied the balancing test. No further memorialization is necessary. Therefore, we hold that the military judge properly instructed the members as to the number of votes which are required by R.C.M. 1004, MCM, 1984.

[4] Included in this assignment of error is the allegation that the military judge overemphasized the requirement that the members were required to unanimously concur in finding an aggravating factor, but underemphasized the requirement that the members could not adjudge a death sentence unless they all first concurred in the finding that any extenuating or mitigating circumstances were substantially outweighed by any aggravating circumstances. Appellant argues that because the military judge instructed on the first requirement seven different times but

only mentioned the second requirement once, the members did not fully and fairly evaluate the evidence but instead adjudged the death penalty in a meaningless manner. We disagree.

Merely mentioning one requirement more than another during instructions does not alone constitute error. There must also be some indication that this resulted in the members improperly performing their duties. There is no such indication in this case. To the contrary, all indications are that the members properly deliberated according to the judge's instructions. Not only did the military judge in this case orally instruct the members, he also provided them written copies of the instructions. If the members had any questions or were confused as to the instructions given by the military judge they could have referred to their copies for clarification. Furthermore, if the members were still confused or did not understand the instructions even after referring to their copies, then they could have requested further clarification from the military judge in open court. However, because the members did not request further clarification in open court and because they could easily refer to their copies of the instructions, we are convinced that the members were neither misled nor misinformed as to their duties in adjudging an appropriate sentence. Accordingly, appellant was provided a fair and full evaluation of all the evidence pursuant to R.C.M. 1004, MCM, 1984, which guaranteed meaningful deliberations by the members prior to the imposition of the death sentence.

III

PRESIDENTIAL PROMULGATION OF R.C.M. 1004

The procedures followed in this capital case in ultimately adjudging the death penalty were those set forth in R.C.M. 1004, MCM, 1984. R.C.M. 1004 was promulgated by the President as a part of MCM, 1984 and be-

came effective 1 August 1984.[3] Appellant contends that the sentencing procedures are invalid because the President exceeded the power delegated to him by Congress under Article 36, UCMJ, 10 U.S.C. § 836, in that the rule is substantive in nature and not procedural.

Judge Albertson, in her dissent, agrees with this proposition, but goes even further in finding fault with the death penalty provisions of MCM, 1984. It is her position that Article 118, UCMJ, has been invalidated as unconstitutional as a result of the United States Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Alternatively, she argues that the President impermissibly encroached on the legislative powers of Congress in promulgating R.C.M. 1004 or, if the delegation could be construed as permissible, Congress failed to provide sufficient specific guidelines to prevent the President from acting arbitrarily.

We disagree with these arguments and find that Article 118, UCMJ, has not been rendered unconstitutional and that the Presidential promulgation of R.C.M. 1004 was legally valid.

A.

We turn first to an analysis of the post *Furman* status of Article 118, UCMJ. In *Furman* and its progeny, the Supreme Court struck down various state death penalty statutes as violating the Eighth Amendment because sentencing authorities were permitted to exercise uncontrolled discretion in determinigng whether to impose the death sentence. As Judge Albertson points out, the dissenters in *Furman* speculated as to the effect the decision might have on other existing state and federal statutes, including the

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[3] It was subsequently amended by Executive Order No. 012550 of 19 February 1986 (MCM, 1984, change no. 2).

Uniform Code of Military Justice. This speculation, however, was simply dicta and in no way directly affected any other statute, including the capital sentencing provisions of Article 118, UCMJ. The decision that did affect these provisions was handed down by the United States Court of Military Appeals in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983). As a result, we must turn to *Matthews* to determine the status of Article 118, UCMJ.

[5] In *Matthews*, the Court of Military Appeals held that the death sentencing procedures employed by courts-martial in capital cases were defective because of the failure to require the court members to make specific findings as to individualized aggravating circumstances which could be factually and legally reviewed on appeal. *Id.* at 380. This holding did not invalidate Article 118, UCMJ, as being unconstitutional. Instead, it merely found that the *procedures* utilized in imposing the death sentence were constitutionally inadequate. The Court recognized Congress' intent that the death penalty by a sentencing option only for certain offenses, including premeditated murder, *id.* at 380, and the Court noted the effect their ruling would have:

> Our ruling in this case . . . creates a void which must be filled promptly in order to effectuate the congressional intent that court-martial members have the option of imposing a death sentence for certain crimes.

Id. at 381.

However, the Court further specifically recognized the continuing vitality of Article 118 by setting forth two alternative means to remedy the deficiencies of the sentencing procedures, neither of which required that Congress reaffirm its intent that the death penalty be authorized for premeditated murder. *Id.* at 380, 381. Congressional intent

that the death penalty exist as a permissible sentence for premeditated murder was in no way thwarted nor invalidated by *Matthews*. We find no holding of any court which has invalidated Article 118 as unconstitutional.

B.

[6] The effect of *Matthews* was to prohibit the imposition of the death penalty until the procedural defect found by the Court was remedied. The Court noted that the action to remedy this defect could either be taken by Congress or the President. *Id.* at 380. Corrective action was taken by the President when R.C.M. 1004 was promulgated as a part of MCM, 1984. The issue is whether this promulgation was legally valid.

Congress has delegated several of its powers with respect to the UCMJ to the President. Article 56, 10 U.S.C. § 856 delegates the power to set maximum punishments for certain courts-martial offenses and Article 3 6 delegates the power to prescribe rules. Article 36, UCMJ, provides, in pertinent part:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall . . . apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

To determine whether the promulgation of R.C.M. 1004 properly falls within this provision we first look to

the Court of Military Appeals discussion in *Matthews*. When indicating that corrective action could be taken by the President in his capacity as Commander in Chief under Article II, Section 2, of the Constitution, and pursuant to the power delegated to him by Congress, the Court stated:

> Pursuant to Article 36 of the Uniform Code, the President promulgates rules to govern pretrial, trial, and post-trial procedures of courts-martial. Unlike other Federal criminal statutes, the punitive articles of the Uniform Code for the most part authorize punishment "as a court-martial may direct"; no maximum or minimum sentence is specified. However, as contemplated by Article 56 of the Uniform Code, 10 U.S.C. § 856, the President prescribes maximum punishment for the various offenses . . .
>
> The great breadth of the delegation of power to the President by Congress with respect to court-martial procedures and sentences grants him the authority to remedy the present defect in the court-martial sentencing procedure for capital cases . . .

Id. at 380, 381.

It is certainly clear from this language that the Court believed it was well within the President's power, as delegated to him by Congress, to promulgate these procedures.[4]

The Court's analysis that the sentencing defects were procedural in nature, and thus within the President's

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[4] The Court of Military Appeals belief that the President has the power to promulgate these procedures is also consistent with the Court's holding in *United States v. Flucas*, 49 C.M.R. 449 (C.M.A. 1975), where the Presidential promulgation of a Manual provision was found to be valid which added the element of knowledge in assault cases where this element was provided as an aggravating factor increasing the maximum permissible punishment.

power to correct, is consistent with the Supreme Court's holding in *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). In *Dobbert*, the death penalty statute in effect at the time the defendant committed murder was struck down as violative of the holding in *Furman*. Prior to the defendant's trial, however, a new death statute was enacted. The question was whether the changes in the new statute were procedural in nature, thus allowing it to be retroactively applied against the defendant, or substantive, thereby prohibiting retroactive application based on the constitutional prohibition against *ex facto* laws. *See* U.S. CONST. art. I, § 10.

The original statute provided that a person convicted of a capital offense would be punished by death unless the jury recommended mercy. The revised statute established, *inter alia*, a bifurcated sentencing proceeding, a specific enumeration of aggravating circumstances, an opportunity to present relevant evidence of mitigating and aggravating circumstances, a test to balance mitigating circumstances against aggravating circumstances and procedures to review any death sentence imposed. In concluding that these changes were procedural and that there was no *ex post facto* violation, the Court stated:

> . . . [t]he change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.

Dobbert, 432 U.S. at 293, 294, 97 S.Ct. at 2298, 53 L.Ed.2d at 356.

The Court further supported the conclusion that the change was procedural by quoting from *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), as follows:

> The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or

> the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.

Dobbert, 432 U.S. at 294, 97 S.Ct. at 2298, 2299, 53 L.Ed.2d at 357.

R.C.M. 1004 established capital sentencing provisions which are similar to the statutory changes in *Dobbert*. R.C.M. 1004 sets forth aggravating factors, one or more of which must be found before death may be considered; provides a notice requirement concerning these factors; provides broad latitude to present evidence in extenuation and mitigation; establishes voting procedures; and provides for necessary findings, including a balancing test, as a prerequisite to adjudging a death sentence. As in *Dobbert*, R.C.M. 1004 simply altered the methods employed in determining whether the death penalty was to be imposed. Thus, we reach the same conclusion as the Court in *Sobbert* as to the nature of these provisions. We find that the changes in the capital sentencing scheme brought about by the provisions of R.C.M. 1004 are clearly procedural.

C.

[7] The next question is whether such a promulgation is contrary to the intent of Congress. We analyze this from two perspectives. First, Article 36(b) requires that the President report to Congress when rules and regulations are made. In accordance with this provision, copies of the Executive Orders promulgating R.C.M. 1004 as a part of MCM, 1984, and the subsequent modification to R.C.M. 1004 were transmitted to Congress. 130 Cong.Rec. H-7611 (daily ed. July 23, 1984) (EC-3679); *id.* S-9217 (daily ed. July 25, 1984) (EC-3579); and 132 Cong.Rec. H-1022 (daily ed. March 11, 1986) (EC-2959); *id.* S-2355 (daily ed. March 10, 1986) (EC-2667). Thereafter, no Congressional objection to R.C.M. 1004 was voiced and, consequently,

tacit approval of these procedures can be inferred. Second, and more important, is the Congressional intent reflected in the passage of Public Law 99-145, Title V, § 534(a), Nov. 8, 1985, 99 Stat. 634, which amended the Uniform Code of Military Justice by establishing espionage as a capital offense under Article 105a, UCMJ, 10 U.S.C. § 906a. This article creates certain aggravating factors which the members must unanimously find beyond a reasonable doubt in order to adjudge a sentence of death. In addition, it provides specific recognition of the President's power to delineate aggravating factors for a capital offense, as follows:

> (4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36).

Article 106a(c)(4), UCMJ, 10 U.S.C. § 906a.

Furthermore, in considering the legislative intent associated with this act we note the following:

> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provisions of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punitive articles.

Department of Defense Authorization Act of 1986, Pub.L. No. 99-145, 1985 U.S.Code Cong. & Admin.News pp. 472, 579.

The legislative intent evidences a clear ratification of the Presidential action in promulgating R.C.M. 1004. This, combined with the statutory provision allowing the Presi-

dent to establish aggravating factors and the tacit approval of R.C.M. 1004, convinces us that Congress does not believe that the President has encroached on its legislative prerogative in this matter.

D.

[8] The only remaining question is whether, in spite of the beliefs of the Court of Military Appeals, the President, and Congress, promulgation of this rule is nevertheless constitutionally flawed because the Congressional delegation of power to the President under Article 36, UCMJ, is violative of the principle of separation of powers.[5] The Supreme Court has long recognized that Congress generally cannot delegate its legislative powers to another branch of Government. *Field v. Clark*, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294, 310 (1892). Nevertheless, they have recognized that this prohibition does not prevent Congress from acquiring the assistance of other branches. *J.W. Hampton, Jr. & Company v. United States*, 276 U.S. 394, 406, 48 S.Ct. 348, 351, 72 L.Ed. 624, 629 (1928). In *Hampton*, the Court indicated:

> In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination . . . . Congress has found it . . . necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion . . . to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.

Id. (Citations omitted).

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[5] U.S. CONST. art I, § 1 provides that legislative powers shall be vested in the Congress of the United States.

As a result, many Congressional delegations of power have been upheld. *See, e.g., Mistretta v. United States*, ____ U.S. ____, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (upholding delegation to the United States Sentencing Commission of the power to promulgate binding sentencing guidelines for federal offenses); *Lichter v. United States*, 334 U.S. 742, 785-786, 69 S.Ct. 1294, 1316-1317, 92 L.Ed. 1694, 1725-1726 (1948) (upholding delegation to Secretary of War and other administrative officials of the authority to determine excessive profits); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600, 64 S.Ct. 281, 287, 88 L.Ed. 333, 344 (1944) (upholding delegation of authority to Federal Power Commission to determine just and reasonable rates).

The Supreme Court has upheld Congressional delegation of authority where it "is sufficiently specific and detailed to meet constitutional requirements", *Mistretta*, ____ U.S. at ____, 109 S.Ct. at 655, and where "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103, 116 (1946). In her dissent, Judge Albertson argues that Article 36, UCMJ, fails to meet these requirements, particularly as to establishing specific standards to prevent the President from acting arbitrarily. We do not agree.

Article 36, UCMJ, delineates the general policy to prescribe pretrial, trial, and post-trial procedures for cases tried by courts-martial. It states that the authority is delegated to the President, and, most importantly, it *does* establish specific boundaries to limit the President's action under this provision. This President, in prescribing these procedures, is bound to apply the principles of law recognized in criminal trials in the United States district courts. Consequently, he does not have unfettered discretion to

do as he pleases. Rather, he may not act arbitrarily and he must follow the law. He is subject to an additional check in that he must report all rules and regulations made under this article to the Congress.

The President's action in promulgating R.C.M. 1004 falls squarely within the specific and detailed boundaries of his authority. R.C.M. 1004 complies not only with the legal principles of the United States district courts, but also with those of the United States Supreme Court. *See Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). We find no defect, constitutional or otherwise, in the promulgation of this rule.

IV

EQUAL PROTECTION

[9] Appellant alleges that he has been denied his right to the equal protection of the law and to be free from cruel and unusual punishment because as a member of the armed forces he has been sentenced to death when this punishment is not available for murder tried in federal civilian courts. The appellant's assertion that his rights under the Fifth and Eighth Amendments have been violated by Congress' decision to make the death penalty available for violations of Article 118, UCMJ, and the President's promulgation of the procedures in R.C.M. 1004, MCM, 1984, for the imposition of the death penalty, is without merit.[6]

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[6] The Eighth Amendment is violated when the death penalty is carried out in barbaric or inhumane method or if it is excessive in relation to the crime committed. *See Coker v. Georgia*, 433 U.S. 584, 97 S.Ct.

[10, 11] The Court of Military Appeals has held that not every distinction or varied treatment of military personnel made by the Government violates equal protection guarantees of the Constitution. *United States v. Means*, 10 M.J. 162, 165 (C.M.A. 1981). It is only when the distinction or treatment becomes unjustifiable discrimination that a service member's due process rights to the equal protection of the laws are implicated. *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A.1958); *United States v. Larner*, 1 M.J. 371, 375 (C.M.A.1976). In order to determine when a distinction or treatment is justifiable it is necessary to first examine whether the Government has utilized constitutionally suspect classifications such as race, religion, or natural origin, or whether the Government is encroaching on fundamental constitutional rights. If neither suspect classification nor fundamental constitutional rights are involved, then the Government's varied treatment of service members need only have a reasonable or rational basis. *Means*, 10 M.J. at 165.

[12] Appellant has alleged that his fundamental right to life is encroached by the Government's decision to make the death penalty a permissible sentence for service members and, therefore, a higher standard of scrutiny should be utilized than the rational basis test for determining whether he has been denied equal protection of the law. This particular issue is of first impression in military law and we will look to federal case law for precedent. The Fifth Circuit Court of Appeals has twice examined this exact issue. In *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982),

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2861, 53 L.Ed.2d 982 (1977); *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982). Since the appellant has not factually developed the method in which naval personnel are to be executed and since the question of whether the death penalty is proportionate to appellant's crime is fully discussed in section VIII, we will analyze this allegation of error pursuant to the due process clause of the Fifth Amendment.

cert. denied, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983), the Court held that the presence of a death penalty in a criminal statute does not encroach on a fundamental right so as to trigger a heightened level of scrutiny. The Fifth Circuit based its decision on the Supreme Court's reasoning in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

In *Gregg*, the Supreme Court reasoned that because of the complex issues involved in determining the moral values of society and the social utility of the death penalty, it is particularly within the province of the legislature to establish the degree of punishment for certain classes of crimes. Therefore, the Court reasoned that the decision to authorize the death penalty for certain classes of crimes should not be upset by the courts unless it is "clearly wrong." *See Gregg*, 428 U.S. at 186-188, 96 S.Ct. at 2931, 49 L.Ed.2d at 882. Accordingly, it was held in *Gray v. Lucas*, that equal protection challenges to a death penalty scheme should be analyzed under a rational basis test, and not the heightened level of scrutiny which appellant urges. This holding was later reaffirmed in *Williams v. Lynaugh*, 814 F.2d 205 (5th Cri.1987), *cert. denied*, 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987).

The legal reasoning in *Gray v. Lucas* and *Williams v. Lynaugh* is sound and we will, therefore, analyze appellant's equal protection challenge to R.C.M. 1004, MCM, 1984, according to the rational or reasonable basis test. *But cf. Skinner v. Oklahoma*. 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed.1655 (1942) (the punishment of sterilization was held to encroach upon the fundamental right of procreation).

[13] Congress had a rational basis for deciding to authorize the death penalty for a violation of Article 118 and to delegate to the President the task of promulgating the procedures to impose this punishment on service mem-

bers. Service members, because of their mission to wage war, may need the more stringent deterrent of capital punishment to ensure discipline. It is the necessity to secure from service members "prompt obedience to lawful orders and the maintenance of the orderliness and self-discipline necessary to the effective operation and control of an armed force in combat" that precipitated the establishment of the UCMJ as a disciplinary system. *United States v. Van Steenwyk,* 21 M.J. 795, 801 (NMCMR 1985). It is because "the military is by necessity, a specialized society separate from civilian society" that civilian definitions of "criminal law" cannot be applied to establish the parameters necessary to maintain military discipline. *Parker v. Levy,* 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439, 450 (1974). Therefore, it is reasonable for Congress to ensure military discipline by providing a heightened punishment for a breach of military criminal law than would be authorized for similar breaches of federal civilian criminal law.

It is also reasonable for Congress to address the potential fears that the civilian community may have towards maintaining a professional and permanent fighting force by authorizing death for certain heinous crimes, such as murder. Clearly, a rational basis exists for the federal Government to distinguish civilians convicted of murder from federally trained and government sponsored military members convicted of murder and to legislate a different form of punishment for these two classes of criminals. Thus, we find the appellant's equal protection challenge to the punishment of death for a violation of Article 118 and to the procedures as set forth in R.C.M. 1004 to be without merit.

V

Challenge For Cause

After lengthy *voir dire,* one of the prospective members, Captain Emerson, was challenged for cause by the Government. The Government based its challenge on the case of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 775 (1968), arguing that because of his religious upbringing and beliefs, Captain Emerson could never, under any circumstances, vote to impose the death penalty. The military judge granted the Government's challenge for cause, stating:

> I believe that he would not have any difficulty in voting for a finding of guilty which would automatically result in a penalty of death. But in this case I think it is clear to the military judge that he does have an inelastic attitude as described for—to voting in *U.S. v. Rojas,* [15 M.J. 902 (NMMR 1983)] and although he used the words that he would consider, I don't think that that consideration would be a meaningful one anyway, and that, notwithstanding his sincerity, he would be compelled to vote for the alternate punishment.

Appellant asserts that the military judge erred in granting this challenge for cause. He contends that the military judge's reliance on *Witherspoon* and *United States v. Rojas,* 15 M.J. 902 (NMCMR 1983), was misplaced and that a new standard exists which would not have excluded Captain Emerson. Appellant is correct to the extent that the standard applicable to this challenge is the one set forth in *Adams v. Texas,* 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). However, we find that the military judge considered *Adams* in making his ruling and that Captain Emerson's views concerning capital punishment permitted

his challenge under this standard. Thus, appellant's contention is without merit.

[14] In *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court reaffirmed that *Adams v. Texas* established the proper standard for determining when prospective jurors may be excluded for cause because of their views on capital punishment.[7] *Adams* permits a juror to be challenged for cause when his views about capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Wainwright,* 469 U.S. at 423, 105 S.Ct. at 851, 83 L.Ed.2d at 851. This standard abolishes the *Witherspoon* reference to "automatically" voting against the death penalty, thereby dispensing with the requirement that a juror could only be excluded if he would never vote for death. In addition, it eliminates the extremely high burden of proving that a juror's bias is "unambiguous" or "unmistakably clear". *Id.* 469 U.S. at 423, 424, 105 S.Ct. at 851, 852, 83 L.Ed.2d at 851, 852.

In applying this standard in *Wainwright,* the Supreme Court upheld the trial judge's excusal for cause of a juror who stated that her beliefs concerning the death penalty would interfere with her sitting as a juror. In so finding, the court gave great deference to the trial judge's findings as long as the findings were fairly supported by the record regardless of whether a reviewing court might disagree with these findings. The Court noted:

> . . . determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in

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[7] In reaffirming this standard, the Court noted that the genesis for excusing jurors in capital cases was to prevent the state's legitimate interest in administering constitutional capital sentencing schemes from being frustrated. *Wainwright,* 469 U.S. at 423, 105 S.Ct. at 851, 83 L.Ed.2d at 851.

> the manner of catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 434, 105 S.Ct. at 857, 83 L.Ed.2d at 858, citing *Marshall v. Lonberger,* 459 U.S. 422, 103 S.Ct. 843, 74 L.Ec.2d 646 (1983).

The Supreme Court similarly applied the *Adams* standard in *Lockhart v. McCree,* 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), and upheld the removal of eight jurors for cause prior to the guilt phase of a bifurcated trial. In that case, the trial judge removed for cause eight of the jurors who stated that they could not under any circumstances vote for the imposition of the death penalty.

[15] In this case, Captain Emerson was thoroughly questioned by both counsel and the military judge. He indicated that he had definite reservations concerning the death penalty. These reservations were founded on his religious teachings and belief that only God could take a life. Captain Emerson appeared to be quite ambivalent during the initial portion of the *voir dire* as to how his beliefs might affect his ability to sit as a member and adjudge a

sentence.[8] Subsequently, however, his feelings became much more focused, particularly after he realized that he had another option available during sentencing other than death:

> DC: ·Well, I'm a little confused because it seems to me that you're saying two things at the same time. Are you saying that it's your religious belief that it's an extremely difficult thing to do, to vote for a death penalty?
>
> MEM (CAPT EMERSON): Yes, sir.
>
> DC: And at the same time you're saying that, yes, because of my obligation as a military officer, I could consider it and I could do it?
>
> MEM (CAPT EMERSON): I could consider it, but once again I stated that if there is another option that I would probably sway towards the other option.

R. 167, 168.

> TC: So you, under no circumstances, because of your religious beliefs could vote for a penalty of death regardless of the facts and circumstances of the case?
>
> MEM (CAPT EMERSON): Yes, sir.
>
> TC: You could consider it, but you could not vote for it?
>
> MEM (CAPT EMERSON): Yes, sir.
>
> TC: Because of your religious beliefs?
>
> MEM (CAPT EMERSON): Yes, sir.

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[8] It is clear from the record that Captain Emerson's religious beliefs would not have interfered with his ability to determine guilt or innocence during the findings phase of the trial.

TC: And that's the truth from the bottom of your heart, is it not?

MEM (CAPT EMERSON): Yes, sir.

TC: Captain Emerson?

MEM (CAPT EMERSON): When he asked me do I consider it, I said "I'd consider it." But once again, I will always go with the other option.

R. 169.

MJ: Now, considering the prefatory remarks of Major Boyett, we got to the point in which you were called upon to cast your vote either for the death penalty or for the other alternative punishment. Do I correctly understand that you would in all events cast your vote for the alternative punishment?

MEM (CAPT EMERSON): Yes, sir.

R. 173.

The foregoing testimony clearly illustrates that Captain Emerson's beliefs would affect his ability to adjudicate a sentence in that he would always choose an alternative other than death even though he would "consider" death. We agree with the military judge that this "consideration" would not be a meaningful one.

We must now examine Captain Emerson's responses in light of the *Adams* test to determine whether his exclusion for cause was proper. We initially note that, contrary to appellant's assertion, the military judge did not rely solely on *Witherspoon* and *Rojas* in ruling on this challenge. In fact, following a recess toward the end of *voir dire,* he compared Captain Emerson's responses specifically with the *Adams* and *Lockhart* cases.

We give deference to the military judge's determination of Captain Emerson's views based on his personal obser-

vation of Captain Emerson and conclude that it is fairly supported by the record. We find that if Captain Emerson had been allowed to serve as a member in this case he would have effectively frustrated the Government's legitimate interest in administering its constitutionally valid death penalty scheme by always voting for an option other than death regardless of the circumstances. We find that Captain Emerson's views would have prevented or substantially impaired the performance of his duties as a juror in accordance with his instructions and his oath. The excusal of Captain Emerson for cause was proper.

VI

Denial of Right to a Panel of Fair and Impartial Members

[16] Appellant made a motion for appropriate relief at trial asserting that his Sixth Amendment right to an impartial jury had been violated in that the members selected by the convening authority did not represent a cross section of the community. This same issue is raised on appeal and, in addition, appellant contends that even if the Sixth Amendment is inapplicable to courts-martial, he nevertheless was denied his due process right to be tried by members with fair and open minds whose impartiality could not be reasonably questioned. We find no merit to either contention.

In support of his motion, appellant called a clinical psychologist to testify. The witness was qualified as an expert in behavioral psychology. As to foundational matters, the psychologist testified that he was aware of the fact that appellant was alleged to have murdered a Marine officer and his wife, that he had reviewed the convening orders and modifications, and was aware of the composition of the prospective membership of the court. The psychiatrist testified that he was concerned that the officer

members would not be totally impartial and objective because of their higher likelihood of identifying with the victim, who was also an officer. He proposed that the situation could be remedied by selecting the prospective members at random. No inquiry was made of the psychologist as to the ability of an officer chosen at random to be impartial and objective. Subsequently, the members were extensively questioned in *voir dire* and, as appellate defense counsel concedes in his brief, the officer members who ultimately decided the case gave no specific responses during *voir dire* which indicated any inability to be impartial. It is also significant to note that the assistant defense counsel acknowledged to the military judge that there was no indication that the convening authority had failed to comply with Article 25, UCMJ, 10 U.S.C. § 825.[9]

Congress has specifically prescribed in Article 25, UCMJ, the qualifications for service as a member of a courts-martial. It provides in pertinent part:

> [T]he convening authority shall detail as members thereof such members as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

The Court of Military Appeals has noted on several occasions that the Sixth Amendment right to a jury composed of a representative cross section of the population does not apply to courts-martial and, in fact, Article 25 contemplates otherwise. *See United States v. Santiago-Davila,* 26 M.J. 380 (C.M.A.1988); *United States v. McClain,* 22 M.J. 124 (C.M.A.1986).

We consider unpersuasive the appellant's argument that the testimony of his expert, standing alone, was sufficient to dismiss the members.

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[9] This is uncontested on appeal.

[17] The record contains nothing at all to support appellant's conclusion. The expert testified in advance of *voir dire* and expressed a "concern" that the officer members might identify with the victim and therefore be partial. This "concern" was wholly unsubstantiated by specific responses of prospective officer members during *voir dire.* While the expert had testified in numerous trials, he admitted that this was the first time he had expressed an opinion on this particular issue. Finally, his remedy to resolve the situation—to randomly select members from the command—leaves open the distinct possibility that the officers chosen in this manner might have the same inclination to identify with the victim. His remedy in no ways seeks to exclude officers entirely from the panel[10] which would logically resolve his concern, but merely offers an alternative method for selecting prospective members than is set forth in Article 25. The proposed remedy is inconsistent with the psychologist's own opinion and detracts from its validity. We find nothing to support the allegation that the officer members might not be impartial. To the contrary, the record is replete with assurances by the members that they would follow the law and give appellant a fair trial. The military judge correctly denied this motion for appropriate relief.

VII

Peremptory Challenge

At the conclusion of *voir dire,* Government counsel peremptorily challenged Staff Sergeant Edwards, a black, who is of the same racial group as appellant. Defense

[10] While an accused is not entitled to a panel composed of entirely enlisted personnel, Article 25 does not preclude such a result. It merely requires that *at least* one-third of the members be enlisted when the accused has made a request for enlisted members.

counsel objected on the basis that the peremptory challenge was used in a discriminatory manner, but the objection was ultimately overruled by the military judge. Appellant contends that the military judge erred in this ruling, thereby denying his right to equal protection of the law.

[18] The Supreme Court has held that a defendant has the right to be tried by a jury from which no "cognizable racial group has been excluded" and, thus, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky,* 476 U.S. 79 at 89, 106 S.Ct. 1712 at 1719, 90 L.Ed.2d 69 at 83 (1986). This right to equal protection is part of due process under the Fifth Amendment and applies to trials by Courts-Martial. *United States v. Santiago-Davila,* 26 M.J. 380 (C.M.A.1988). *See also United States v. Shelby,* 26 M.J. 921 (NMCMR 1988).

[19] *Batson* provides that once the defendant makes a prima facie showing of purposeful discrimination in the Government's use of the peremptory challenge, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson,* 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed. 2d at 88. A prima facie case is established when the defendant shows that he is a member of a cognizable racial group; that the prosecutor exercised peremptory challenges to remove members of defendant's racial group; and, that these facts and any other relevant circumstances raise an inference that the use of these challenges was to purposely exclude jurors because of race. This inference is based on the totality of the circumstances and such things as a "pattern" of strikes of members of a racial group or the prosecutor's questions and statements during *voir dire,* may be considered.

Batson, 476 U.S. at 96, 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88.

[20] It is insufficient to rebut the prima facie case by a mere assertion of the prosecutor that he was properly performing hs duties and had no discriminatory motive for his challenge. It is not, however, necessary for the neutral explanation to rise to the level that would justify a challenge for cause. *Batson,* 476 U.S. at 97, 106 S.Ct. at 1722, 1723, 90 L.Ed.2d at 88. In *Batson,* the case was remanded because the prosecutor used his peremptory challenges to remove all four black persons on the venire which resulted in the defendant, also black, being tried by an all white jury.

In *Santiago-Davila,* the accused was of Hispanic descent and the court members selected by the convening authority consisted of ten officer and enlisted members, two of whom had Hispanic surnames. Following *voir dire,* the Government peremptorily challenged one of the Hispanics and the military judge allowed the challenge to stand in spite of an objection by defense counsel. The military judge offered trial counsel an opportunity to state a reason for the challenge but trial counsel declined to do so and the military judge did not require that a reason be given. In remanding *Santiago-Davila,* the Court of Military Appeals found that a prima facie case of purposeful discrimination had been established which required that a neutral explanation be given. The Court was not persuaded by the fact that one Hispanic remained on the panel, and it was of particular importance that they found an absence of anything in the *voir dire* or anywhere else in the record to clearly indicate anything other than race as a motive for the challenge. *Santiago-Davila,* 26 M.J. at 391.

Turning to the case *sub judice,* the court selected by the convening authority consisted of nine officers and six

enlisted members. Of these, six were black. One black officer was successfully challenged for cause by the defense because he knew Lieutenant Lotz and was Lotz's superior in the chain of command. Another black officer, Captain Emerson, was also challenged for cause by the Government for the reasons discussed in a prior assignment of error. The Government further successfully challenged for cause a white officer without objection and the defense similarly challenged for cause two more white officers. Thus, at the time the Government exercised its peremptory challenge against Staff Sergeant Edwards, the panel consisted of four officers and six enlisted persons, four of whom were black. The final racial composition of the court was six whites and three blacks (one officer and two enlisted).

During *voir dire,* trial counsel initially experienced some difficulty in ascertaining that Staff Sergeant Edwards understood the concept of the government's burden to establish guilt beyond a reasonable doubt and required assistance by the military judge in defining terms. Thereafter, the *voir dire* appeared to proceed smoothly without revealing anything of particular significance until the following relevant exchange occurred:

> TC: I'll just ask one general question, Staff Sergeant. How do you feel about, again, being—sitting here as a member in this case? Your own words.
>
> MEM (SSGT EDWARDS): I feel, sir, basically that it would be to me a learning experience. And coming in with an open mind, being able to give everything, weighing out everything, and listening to all the facts before I finally say whether a person is innocent or guilty, it would be a good experience for me and something that I would like to go through, sir.

TC: You'd also agree that not – it's not only would be a learning experience, it would be a very, very serious responsibility?

MEM (SSGT EDWARDS): Yes, sir.

TC: Possibly one of the more serious responsibilities in your whole life?

MEM (SSGT EDWARDS): Yes, sir.

This concluded the *voir dire* of Staff Sergeant Edwards and he was subsequently peremptorily challenged by the Government. Defense counsel made a timely objection and requested that the government state the reason for the challenge. At the time, because *Santiago-Davila* had not yet been decided, the military judge and counsel recessed and considered the ruling in *Batson*. Thereafter, the military judge and trial counsel believed it would be best for the trial counsel to state the reason for his challenge. There was no discussion or finding as to whether a prima facie case of purposeful discrimination had been established. The defense counsel expressed his concern as follows:

DC: Now, it strikes the defense that the government has known for some three and a half months that this case involved a defense theory which potentially would involve racial prejudice. As I remember the answers of Staff Sergeant Edwards, he met all legal criteria to be a member. No one had any objection to him for cause or anything like that. And it strikes the defense as rather strange at this particular point in time that the government is using its one peremptory challenge to take a black man off this jury. Of course, there's nothing that I can point to which proves that it's racially motivated in any particular form, fashion, or manner because I can't look in the minds of the

prosecution. But it essentially gives a bad flavor to the whole thing and it's the position of the defense that we should not only be worried about actual fact, but impression and how it looks as well because the court is, after all, essentially, an instrument which is supposed to arrive at fairness.

The military judge discussed the challenges of the other blacks from the panel.

MJ: Well, of course, there were—I think at least two black members that were excused by challenges for cause, but neither one of those had any racial foundation; is that correct?

DC: Yes, sir.

After further discussion concerning specific rationale for these challenges, trial counsel stated his reason for challenging Staff Sergeant Edwards.

TC: My articulation, sir, is, first of all, in my opinion Staff Sergeant Edwards' responses to the voir dire, while satisfactory, didn't indicate to me to be the kind of member that the government would want on this case and one thing particularly that he said, if I remember correctly, he said that he would consider this as a learning experience which, in the Government's opinion, that was not the—while not challengeable for cause, that is why the government chose to exercise its peremptory challenge on him.

Appellant contends that this is not the neutral basis for challenge required by *Batson*. The Government asserts that trial counsel's explanation indicated that the purpose for the challenge was race-neutral assuming *arguendo* that prima facie case of discrimination had been shown.

In deciding this issue we will initially analyze whether there was a prima facie showing of purposeful discrimination in connection with the peremptory challenge of Staff Sergeant Edwards. First, appellant is a member of a cognizable racial group and, second, the Government's peremptory challenge sought to remove a member of that group. The only remaining question is whether the totality of the circumstances raise an inference that the challenge was used to exclude this member solely because of race.

Examining the pattern of challenges exercised by trial counsel, we note that challenges for cause were exercised against one white and one black officer. The black officer was challenged because of his beliefs regarding capital punishment. In fact, defense counsel agreed with the military judge that this challenge had no racial foundation. Appellate defense counsel further concedes that he can point to nothing which proves the challenge was racially motivated. Our review of the record likewise reveals nothing said by trial counsel during *voir dire* that would infer the challenge was racially motivated. Our determination of this question is hampered by the fact that the military judge made no findings with respect to this prima facie showing either because he simply neglected this step in applying the *Batson* principles or because he believed there was an automatic inference of purposeful exclusion merely because of the defense theory involving racial prejudice or for some other reason. Without speculating further, we will exercise caution and follow the Court of Military Appeals in their belief that the trial judge is able to decide if all of the circumstances surrounding the challenge create a prima facie case. *Santiago-Davila,* 26 M.J. at 392.

[21] Finally, we must analyze whether trial counsel's explanation was neutral. Trial counsel stated that Staff Sergeant Edwards was not the kind of member the Gov-

ernment wanted on the case because he stated he would use it as a learning experience.[11] In response to this explanation the military judge indicated that this was the only thing he had written down with respect to Staff Sergeant Edwards. He noted that it was probably an unfortunate choice of words but it nevertheless caught his attention. The military judge, in denying the defense's objection and thus sustaining the peremptory challenge found that, while he might not agree with the Government's stated reason, it was understandable and had sufficient foundation to satisfy *Batson*. We agree with the military judge.

Trial counsel's questioning during the entire *voir dire* reflected the fact that he wanted the court to consist of members who were aware of the serious responsibility of deciding a capital case and who were capable of carrying out that responsibility. We believe that trial counsel sensed something less than these qualities in Staff Sergeant Edwards and felt that a case with the serious consequences of this one should not be used as a "learning experience". We find this explanation to be totally devoid of any racial motivation and to be completely neutral.

VIII

Appropriateness of the Sentence to Death

Finally, we consider the appropriateness of appellant's sentence to death. Appellant contends that he should not

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[11] There may have been other factors of concern to trial counsel such as the difficulty he encountered in explaining to Staff Sergeant Edwards the concept of the Government's burden to prove guilt beyond a reasonable doubt. We will not speculate, however, as to what "other" factors may have influenced trial counsel to exercise this challenge and we have confined our analysis solely to the reason stated in the record.

be put to death because his murder of the Lotzs was simply a reaction to the way he had been treated by Lieutenant Lotz. He also contends that no proper penal interest would be served by such a sentence. He argues that these factors militate against imposition of the death penalty in this case. Chief Judge Byrne in his dissent, cites the "racial stereotyping of appellant by Lieutenant Lotz",[12] as well as the lack of recent precedent for executions in the Naval Service, as reasons for opposing the death penalty in this case. We do not agree with this reasoning.

We begin our analysis of this issue by carefully considering Lieutenant Lotz's relationship with his subordinates and the atmosphere that existed in the supply office. Lieutenant Lotz referred to his subordinates by nicknames, either nicknames he coined himself or those invented by others. A Marine of Peruvian descent was called "a fuzzy headed foreigner"; others had names such as "tomahawk", "red", and "Jonesy". Lotz's use of nicknames was not confined to persons in his office and he called a black Marine officer friend, "Action Jackson". Several nicknames were used with respect to appellant – "Bebop Curtis" and "Curtis Blow" (apparently in reference to a black "rap" singer). In addition to the use of nicknames, Lotz allowed music to be played in the work spaces, and this was often "rap" music. While listening to this music, Lotz, on occasion, imitated what he thought were black mannerisms. The atmosphere was described by some as joking and casual.

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[12] In support of this reason, Chief Judge Byrne states that racial prejudice in sentencing was an underlying rationale for striking down the death penalty in *Furman*. Such rationale is inapposite to this case since in *Furman* the racial prejudice under consideration was that of the jury against the defendant rather than any prejudice by the victim against the accused as alleged in this case.

Following a supply inspection, Lotz was criticized by the inspector for calling his subordinates nicknames and was told that this practice was unprofessional. Thereafter, Lotz called the office personnel together and inquired as to whether the use of nicknames was offensive to anyone. No one present, including Curtis, voiced an objection to this practice and the use of nicknames continued.

Appellant testified that he was nevertheless bothered by these nicknames and by Lotz snapping his fingers at him, calling his mother by her first name and criticizing him for a bad attitude. Appellant acknowledged on cross-examination that his proficiency and conduct marks had improved under Lotz and that Lotz was training him for a job of increased responsibility within the office. Coworkers characterized the occasional criticism of Curtis as justified because Curtis was a slow worker and was sometimes lazy. Appellant asserts that Lotz's actions, as a whole, were offensive to him and that he perceived Lotz to be racially prejudiced.[13]

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[13] We are unable to determine whether or not Lieutenant Lotz was, in fact, racially prejudiced. We note, however, that substantial evidence was admitted that Lotz was neither racially prejudiced nor acted in a discriminatory manner. For example, two black sergeants and a black staff sergeant who worked in the supply office testified that they did not believe that Lotz was racially prejudiced. They did not perceive "racial tension" in the office nor did they believe that the use of nicknames and imitations by Lotz were done in a racially derogatory fashion. The Company First Sergeant, also a black Marine, testified that during his twenty-five years of active duty he had seen racial prejudice; however, after knowing Lieutenant Lotz for two years, it was his opinion that Lotz was not prejudiced against black Marines. First Lieutenant Jackson, a black officer, knew Lotz well for almost eight months and testified that there was no question in his mind that Lotz was not prejudiced. Finally, a young black civilian testified that he lived with Lieutenant and Mrs. Lotz for about three months while he assisted Mrs. Lotz in coaching a basketball team at the school where she taught. He was treated as a member of the family in almost a "parental relationship".

It is apparent that Lieutenant Lotz was insensitive to the feelings of minorities and to the potential effect of his conduct in this regard. Additionally, it is apparent that Lieutenant Lotz made the mistake which some junior, relatively inexperienced officers make of creating an overly familiar, informal atmosphere with his subordinates in an attempt to be accepted. This is not a proper or professional relationship between officers and enlisted personnel. The question, however, is whether Curtis should now be exempt from the death penalty because of the flawed leadership style of Lieutenant Lotz?

[22] This question can be phrased in another manner: whether one who is dissatisfied with what he perceives to be the improper actions of his superior should escape the most severe punishment for murdering that superior? We believe that it is contrary to the interests of society to mandate a lesser punishment for such a crime and still expect that such crimes will be deterred in the future. This is particularly true in a military environment where the very cornerstone of our system of discipline is the superior-subordinate relationship. To allow, or even suggest, that one should be less severely punished because of a "perception of maltreatment" by a superior would tear at the very fiber of our military system of discipline. We reject the notion that the death penalty is inappropriate under the circumstances of this case based on Curtis' perception of his relationship with Lieutenant Lotz.

Even if we were to believe that appellant's perception of mistreatment by Lotz somehow militated against the death penalty for killing Lieutenant Lotz, it is inexplicable why this is any way lessens his culpability for the brutal slaying of Mrs. Lotz. Curtis savagely stabbed Joan Lotz seven times as she begged for him to stop and then indecently assaulted her as she lay dying. Curtis admitted that Joan Lotz never did anything to hurt him.

[23] We next address the argument that the death sentence is inappropriate simply because it has not been imposed in the Naval Service in recent history. This fact alone is not dispositive of the issue. As previously discussed in Section III, Congressional intent that death be a sentencing option for premeditated murder remains viable today. In addition, while no death sentences have been carried out in the recent past, the military community has recently expressed its intent that death is the appropriate sentence for premeditated murder under certain circumstances by adjudging death at the courts-martial level. *See United States v. Turner,* No. 85-4044 (NMCMR 8 August 1986), *rev'd,* 25 M.J. 324 (C.M.A.1987), *aff'd,* No. 85-4044R (NMCMR 31 October 1988) (convening authority commuted death sentence to life imprisonment); *United States v. Rojas,* 15 M.J. 902 (NMCMR 1983), *rev'd in part,* 17 M.J. 154 (NMCMR 1981) (death sentence reversed for constitutional procedural infirmity, not for inappropriateness); *United States v. Hutchinson,* 15 M.J. 1056 (NMCMR 1983), *rev'd in part,* 18 M.J. 281 (C.M.A.1984) (summary disposition) (death sentence reversed for constitutional procedural infirmity, not for inappropriateness). We find these expressions of intent to be persuasive and discount any bar to approving the death sentence based on when the last time such a sentence was carried out.

[24] Lastly, we address the contention that death serves no penal interest. The death penalty serves two social purposes: deterrence and retribution. *Gregg v. Georgia,* 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-2930, 49 L.Ed.2d 859, 880. Appellant argues that deterrence can be accomplished with a life sentence and that retribution is irrational and has no place in the military justice system. We reject this argument.

As we previously noted, deterring serious criminal misconduct is of particular importance in the military because

our ability to fulfill our mission is directly related to the discipline of our forces. In order for deterrence to be effective, we believe the full range of punishments for a particular offense ought to be available and that the punishment should be tailored to the individual and the circumstances of the offense.

Contrary to appellant's assertion, retribution has a place in our system of justice. In *Gregg,* Justice Stewart, in discussing retribution noted:

> [C]apital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

Id. 428 U.S. at 183, 96 S.Ct. at 2930, 49 L.Ed.2d at 880.

Justice Stewart further noted in *Gregg* a speech on capital punishment given by Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, in which it was stated:

> The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.

Royal Commission on Capital Punishment, minutes of Evidence, Dec. 1, 1949, p. 207 (1950).

[25] In this case, we view the crimes committed by Curtis to be heinous and outrageous. The slaying of Lieutenant Lotz, Curtis' officer-in-charge, and Mrs. Lotz in their quarters aboard a military base and the manner in which these killings were accomplished convinces us that the death sentence is clearly proper. We do not arrive at this conclusion lightly and have carefully considered all of the circumstances surrounding the offenses and all evidence

of extenuation and mitigation. Taking all of these factors into consideration, we find the sentence to death to be appropriate in this case.

IX

Decision

We have carefully examined the record of trial, the clemency request, the assignments of error and the Government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. We are convinced of appellant's guilt of all of the charges and specifications beyond a reasonable doubt and specifically find the sentence to be appropriate. Article 66(c), Uniform Code of Military Justice.

Accordingly, the findings and sentence, as approved on review below, are affirmed.

Senior Judges COUGHLIN and RILEY, and Judges MCLERAN, MIELCZARSKI, JONES and RUBENS concur.

BYRNE, Chief Judge (concurring/dissenting):

I believe life imprisonment, not death, is the appropriate penalty in this case.

The racial stereotyping, by one of the two murder victims, precipitated appellant's violent acts. *See, e.g.*, R. 591, 602-605.

This fact is vital because a matrix of contexts circumscribes when the death penalty is appropriate in the Naval Service. A Marine has not been executed since 1817.[1]

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[1] Solis, LCOL Gary D., *Marines and Military Law In Vietnam, Trial by Fire* (Working Draft) History and Museums Division, Headquarters, U.S. Marine Corps.

There are strong religious and moral factors weighing against imposition of this ultimate sanction. Concern with racial prejudice in sentencing underlies the Supreme Court's rationale in *Furman v. Georgia.*[2] The Supreme Court has fenced in the death penalty with unique constraints limiting its imposition—in contrast to other lawful, imposable punishments.[3]

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[2] *See, e.g., Furman v. Georgia,* 408 U.S. 238, 251-53, 363-367, 92 S.Ct. 2726, 2732-33, 2763, 2789-91, 33 L.Ed.2d 346, 355-57, 390, 420-22.

[3] In *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), Justice Stewart stated:

> While Furman did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Mr. Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 US, at 313, 33 LEd2d 346, 92 S Ct 2726 (concurring). Indeed the death sentences examined by the Court in Furman were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in Furman were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Id. [408 U.S.] at 309.310, 33 LEd2d 346, 92 SCt 2726. (Stewart, J., concurring).

428 U.S. at 188, 96 S.Ct. at 2932, 49 L.Ed.2d at 883.

Later, Justice Stewart concluded:

> In summary, the concerns expressed in Furman that the penalty

Consequently, before any system of criminal justice in this land executes the death penalty, its rationale for doing so must be capable of withstanding withering scrutiny.[4] The crimes committed by the accused must "cry out" for death. The racial overtones in this case have silenced that cry, in my opinion.

I would affirm only so much of the sentence as provides for confinement for life, total forfeitures, a dishonorable discharge, and reduction to pay grade E-1.

In all other respects, I concur with Judge Strickland's opinion.

ALBERTSON, Judge (concurring in part/dissenting in part):

I concur with the majority on their resolution of all issues except those discussed in section's three and eight of the majority opinion. I dissent from their resolution of

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> of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

428 U.S. at 195, 96 S.Ct. at 2935, 49 L.Ed.2d at 887.

[4] Professor of Law George E. Dix commented in a Georgetown Law Journal article regarding appellate review of death sentences:

> Such a review implicitly includes an evaluation of whether reasonable persons would regard the death sentence as disproportionate to the offender's culpability, given the nature of the crime committed, the circumstances of its commission, and possible influences upon the defendant.

PIX, George E., "Appellate Review of the Decision To Impose Death," 68 Geo. L.J. 93, 107.

the assignment of error relating to the Presidential authority to promulgate Rule for Court-Martial (R.C.M.) 1004, Manual for Courts-Martial (MCM), 1984, because I have concluded that, until Congress acts in an affirmative manner, the Article 118, Uniform Code of Military Justice (UCMJ), provision authorizing the imposition of the death penalty is constitutionally invalid as a result of the Supreme Court's decision in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Even if I am incorrect in that conclusion, I further conclude that the delegation of authority by the Congress to the President to promulgate R.C.M. 1004(c) was absolutely impermissible and as presently set forth in Article 36, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836, does not include sufficient standards to guide the President, in accordance with the principles set forth in *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935), to promulgate R.C.M. 1004(c).

R.C.M. 1004 enunciates the only procedures and aggravating factors within the military justice system (except for Article 106a, UCMJ) for determining the appropriateness of the imposition of the death penalty. R.C.M. 1004 was promulgated in light of the suggestion of the United States Court of Military Appeals decision in *United States v. Matthews,* 16 M.J. 354 (C.M.A.1983) which in turn was based upon the United States Supreme Court decision in *Furman v. Georgia.* Thus, I do not contest the finding of my Brothers in the majority that the procedures set forth in R.C.M. 1004(a), (b), (d) and (e) meet the requirements the Supreme Court mandated before imposition of the death penalty could be considered constitutional. I believe, however, that the only Governmental authority that can identify, at least as they relate to aggravating factors, (*i.e.,* R.C.M. 1004(c)) and effectuate the standards

for imposition of the death penalty in accordance with the Supreme Court's mandate within the military justice system, as it is presently established, is the United States Congress. While Congress might be able to delegate the *Furman* mandate, it can only do so after meeting certain criteria, *United States v. Mistretta,* __ U.S. __, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) citing *American Power and Light Co. v. SEC,* 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946),[1] which, at this point in time, it has not met. Accordingly, I find that the imposition of the death penalty upon a military accused convicted within the military justice system is unconstitutional under the principles announced in *Furman v. Georgia,* (hereinafter *Furman*) and *United States v. Mistretta.* I shall explain in more detail below. With regard to the eighth assignment of error, the appropriateness of the imposition of the death penalty in appellant's case, I dissent only because I cannot reach a consideration of that issue since I am not convinced that the death penalty is a valid punishment or that the guidelines set forth in R.C.M. 1004(c) are authorized and appropriate guidelines.

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[1] As quoted in the recent Supreme Court decision of *Mistretta v. United States,* __ U.S. __, __, 109 S.Ct. 647, 652-54, 102 L.Ed.2d 714 (1989): "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its functions.' *Panama Refining Co. v. Ryan,* 293 U.S. 388, 421, 55 S.Ct. 241, 248, 79 L.Ed. 446 (1935). Accordingly, this Court has deemed it 'constitutionally sufficient' if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power and Light Co. v. SEC,* 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946).

I.

Furman v. Georgia

Furman declared that existing state capital punishment statutes violated the Eighth Amendment because they permitted exercise of uncontrolled discretion by sentencing authorities in determining whether to impose capital punishment in any specific case. *United States v. Matthews,* 16 M.J. at 369. Subsequently in *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. at 2920, 49 L.Ed.2d at 859 (1976) (hereinafter *Gregg*), the Supreme Court examined the new (post-*Furman*) Georgia statute which retained the death penalty for six categories of crime. In addition to the six categories of crime for which the legislature retained the death penalty, the Georgia legislature also adopted new trial procedures and capital sentencing guidelines that it mandated be followed before imposition of the death penalty upon one convicted of a capital offense was authorized. For example, the Georgia statute established a bifurcated trial, including a separate sentencing stage wherein evidence in aggravation, extenuation, and mitigation of the crime was presented. Additionally, the judge was required to instruct the jury as to any of 10 statutory aggravating circumstances that were supported by the evidence and that it, the jury, must find, and specify, at least one of the ten aggravating circumstances beyond a reasonable doubt before they could adjudge the death penalty. Finally, the new statute required expedited and automatic direct review by the state supreme court.

The Supreme Court upheld the new Georgia statute as passing constitutional muster because the jury's attention had been focused "on the particularized nature of the crime and the particularized characteristics of the individual defendant." *Gregg,* 428 U.S. at 206, 96 S.Ct. at 2940, 49 L.Ed.2d at 893. In particular the Court was im-

pressed with the channeling of the jury's discretion such that the jury could not impose the death sentence in a wanton and freakish manner. The Supreme Court arrived at the same conclusion with regard to Florida's reenacted statute. *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, *reh'g den.* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

II.

Impact Of *Furman* On Article 118, UCMJ

What, then, is the status of Article 118, UCMJ? In 1950 Congress enacted Article 118, Uniform Code of Military Justice, 10 U.S.C. § 118. That article defines the offense of murder within the military community. Within that statute Congress identified four specific types of murder of which two, premeditated murder [Article 118(1)] and murder committed during the commission of certain felonies [Article 118(4)], were designated capital offenses. The other two types of murder, death as a result of an act done with the intent to kill or inflict great bodily harm [Article 118(2)] and death resulting from an act inherently dangerous to others [Article 118(3)], were designated as offenses punishable "as a court-martial may direct."[2] *See*

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[2] The legislative history to Article 56, UCMJ, wherein the Congress gave the President broad authority to set the maximum punishment for offenses which a court-martial may direct and which a court-martial could not thereafter exceed when directing punishment, clearly reveals that Congress never intended the President to deal in any way with the death penalty. In fact, the hearings relating to Article 56, in particular, reveal concern that the wording of the provisions be carefully articulated so that assurance could be had that the President could never make an offense a capital offense that the Congress itself had not declared capital. Index and Legislative History of the Uniform Code of Military Justice, HH at 1187.

R.C.M. 1003(b). Offenses punishable "as a court-martial may direct" have generally been understood to carry any punishment exclusive of death, *see, e.g.*, para. 127(c), (Article 118) MCM, 1969; para. 43(e), Part IV, MCM, 1984, and exclusive of those punishments deemed cruel and unusual under Article 55, UCMJ. Article 118 has not been amended since the enactment of the UCMJ. Thus, Article 118 is a pre-*Furman* statute.[3]

The next step is to determine what impact the Supreme Court's decisions in *Furman* and *Gregg* have on pre- *Furman* statutes, such as Article 118, in which the death penalty is authorized but fails to set forth *Furman-Gregg* type guidelines.[4] In other words, what is the status of Article 118 in view of *Furman?*

I believe the concurring and dissenting opinions in *Furman* clarify its impact on Article 118's status.[5] First, let us

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[3] By analogy then, Article 118—and any other death penalty offenses within the UCMJ, with the exception of Article 106a—should be in the same status as those state statutes which *Furman v. Georgia* declared unconstitutional. Since *Furman,* at least 35 of those states having *Furman* invalidated statutes, have, through the positive action of their legislatures, taken action to reinstate the death penalty for some offenses and provide the guidelines required by *Furman. E.g., Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, *reh'g den.* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

[4] We do recognize, as the Court of Military Appeals did in *Matthews,* that many of the procedures within the military justice system, such as a bifurcated trial and the opportunity to present aggravating, extenuating and mitigating evidence on sentencing, probably meet some of the Supreme Court's concerns. The court-martial process did not, however, address the concept of finding and weighing aggravating and mitigating factors by some identified standard such that unfettered, and possibly discriminatory, discretion was not controlled.

[5] We must look at the various concurring and dissenting opinions to attempt to elicit the intended impact of *Furman* because no unified

look at the concurring opinions that provide the narrowest grounds for the majority's opinion. Justice Stewart concurred in reversing Furman's sentence to death because he believed that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman,* 408 U.S. at 310, 92 S.Ct. at 2763, 33 L.Ed.2d at 390. Justice White, also concurring, stated:

> . . . [A]s the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.
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> In this respect, I add only that past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative "policy" is thus necessarily defined not by what is legislatively authorized but by what juries and

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majority opinion explaining the result was arrived at by the Court. Accordingly, what other way can we determine the exact intent of the Court other than to glean from the concurring and dissenting opinions what the Court as individuals believed was the impact of the decision. *See Gregg v. Georgia,* 428 U.S. at 169, n. 15, 96 S.Ct. at 2909 n. 15, 49 L.Ed.2d at 859, n. 15 (1976); *Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); Annotation, "Supreme Court's Views on Constitutionality of Death Penalty and Procedures Under Which It Is Imposed." 51 L.Ed. 886; Annotation, "Binding Effect Upon State Courts of Opinion of United States Supreme Court Supported by Less Than Majority of All Its Members." 65 ALR3d 504.

> judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment.

408 U.S. at 313-314, 92 S.Ct. at 2764, 33 L.Ed.2d at 392-393.

Now let us turn to the dissenters. Chief Justice Burger stated in his dissent:

> The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems clear: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past.

408 U.S. at 397, 92 S.Ct. at 2807, 33 L.Ed.2d at 440.

The Chief Justice went on to say:

> While I would not undertake to make a definitive statement as to the parameters of the Court's ruling, it is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant *statutory* changes will have to be made . . . . (Emphasis added.) [L]egislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determing the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.

408 U.S. at 400, 92 S.Ct. at 2809, 33 L.Ed.2d at 442. Finally, the Chief Justice stated:

> Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and

unambiguous answer on the basic constitutional question, *the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress.* (Emphasis added.) While I cannot endorse the process of decision making that has yielded today's result and the restraints that result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough reevaluation of the entire subject of capital punishment. If today's opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts.

408 U.S. at 403, 92 S.Ct. at 2811, 33 L.Ed.2d at 444. Also dissenting was Justice Powell who wrote:

Because of the pervasiveness of the constitutional ruling sought by petitioners, and accepted in varying degress by five members of the Court, *today's departure from established precedent invalidates a staggering number of state and federal laws.* (Emphasis added.) The capital punishment laws of no less than 39 States (footnote omitted) and the District of Columbia are nullified. In addition, *numerous provisons of the Criminal Code of the United States and of the Uniform Code of Military Justice also are voided.* (Emphasis added.) The Court's judgment not only wipes out laws presently in existence, but denies to Congress and to the legislatures of the 50 States the power to adopt new policies contrary to the policy selected by the Court . . . .

[T]he impact of the majority's ruling is all the greater because the decision encroaches upon an area squarely within the historic prerogative of the

> legislative branch – both state and federal – to protect the citizenry through the designation of penalties for prohibitable conduct. It is the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped.

408 U.S. at 462-463, 92 S.Ct. at 2840, 33 L.Ed.2d at 418.

Justice Blackmun, dissenting, found:

> Not only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided. No longer is capital punishment possible for [various federal crimes listed in Title 18 U.S. Code]. Also in jeopardy, perhaps, are the death penalty provisions in various Articles of the Uniform Code of Military Justice. 10 USC §§ 885, 890, 894, 899, 901, 904, 906, 913, *918*, and 920. (Emphasis added.) All these seem now to be discarded without a passing reference to the reasons, or the circumstances, that prompted their enactment, some very recent, and their retention in the face of efforts to repeal them.

408 U.S. at 412, 92 S.Ct. at 2815, 33 L.Ed.2d at 449.

From these dissents, it would appear that at least four justices of the Supreme Court believed that *Furman* declared all state and federal statutes, including the UCMJ, null and void if they authorized the imposition of the death penalty but did not meet the standards identified by *Furman*.[6] The Ninth Circuit Court of Appeals was com-

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[6] Even though three of the justices who participated in *Furman* are no longer members of the Court, six of the *Furman* Court do remain and might continue to represent a majority should the constitutionality of Article 118's death penalty be presented. In playing the numbers game then, we know that of those six remaining justices, two justices would declare the death penalty unconstitutional per se; one justice

pelled to reach the same conclusion in *United States v. Harper,* 729 F.2d 1216 (9th Cir.1984). In fact, it based its conclusion on the position not only of petitioner, but also of the Government, whose brief on this issue in the district court stated that Title 18 U.S.C. § 794's death penalty provision is:

> . . . unenforceable and void because it sets forth no *legislated* guidelines to control the fact-finder's discretion. (Emphasis added.) The Department of Justice has long been of the view that *Furman* rendered section 794's death penalty provision unconstitutional. *See Imposition of Capital Punishment:* Hearings on S. 1, S. 1400, and S. 1401 Before the Sub-comm. on Criminal Laws and Procedures of the Comm. of the Judiciary, 93d Cong., 1st Sess. 43 (1973) (statement of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice); To Establish Constitutional Procedures for the Imposition of Capital Punishment: Hearings on S. 1382 Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, 95th Cong., 1st Sess. 22 (1977) (statement of Mary Lawton, Deputy Assistance Attorney General, Office of Legal Counsel, Department of Justice); Capital Punishment: Hearings on S. 114 Before the Comm. of the Judiciary, 97th Cong., 1st Sess 22 (1981) (statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice). Moreover, the Senate has recently passed a bill, supported by the Justice Department, that would

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would not declare the death penalty unconstitutional per se but would declare discretionary statutes unconstitutional; and four justices believe the *Furman* decision declares the death penalty statutes in existence at the time of the opinion null and void.

> authorize the imposition of the death penalty for certain crimes, including espionage. S. 1765, 98th Cong., 2d Sess., 130 Cong.Rec.S. 1491-93.
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> In light of the above, we believe it clear that the death penalty provision of the espionage statutes is unconstitutional. It cannot be saved by judicial formulation of the missing, but essential, statutory guidelines.

729 F.2d at 1225-6. *See McKenzie V. Risley,* 801 F.2d 1519 (9th Cir. 1986), *cert. denied* __ U.S. __, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988).

Additionally, the decisions of the federal circuit courts, *e.g., United States v. Watson,* 496 F.2d 1125, 1129 (4th Cir. 1973) and *United States v. McNally,* 485 F.2d 398 (8th Cir. 1973) (*en banc*), reflect the two differing rationales state and federal courts have utilized for analyzing the continuing constitutional validity of statutes related to the imposition of the death penalty in light of *Furman.*[7] *Watson* sides with the classification rationale while *McNally* reflects the penalty rationale.[8]

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[7] Annotation, "Effect of the Abolition of Capital Punishment on Procedural Rules Governing Crimes Punishable by Death—Post-*Furman* Decisions." 71 A.L.R.3d 454, 457-460.

[8] The *Watson* court was concerned with the impact of *Furman* on a federal statute that gave the defendant a procedural right to two attorneys if he faced the possibility of the imposition of the death penalty. Since it was unable to determine that the sole reason Congress gave the accused the procedural right in question was because of the possibility of the imposition of the death penalty, a possibility that no longer existed, it refused to hold the procedural right inapplicable to a defendant convicted under the statute which Congress had done nothing about since *Furman.* Thus, *Watson* looked at the death penalty provision as a not only a penalty provision that may or may not be capable of imposition but as a means for classifying an offense as one of the most severe types of offenses.

> We have no doubt that *Furman* raises pointed legislative questions of whether section 3005 should not be repealed or whether

These judicial decisions shed some light on how we might interpret the status of Article 118 as a whole, or the status of its provision authorizing imposition of the death penalty in particular. The courts that follow the classification rationale hold that the statutes identifying offenses as "capital offenses" established a category of offenses that because of their gravity remained classified as "capital offenses." That being so, all statutes that interrelated to a "capital offense" statute remained operative if a capital offense was involved. The courts using the penalty rationale declare that since capital punishment provisions were no

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> the various provisions of Title 18 which purport to authorize the imposition of the death penalty should be amended in an effort to harmonize them or to validate them under *Furman* . . . But we conceive these to be legislative questions and not judicial ones, especially when a holding by us that *Furman* has effected a repeal of section 3005, of necessity, would probably create serious doubt as to whether the various other provisions of Title 18 and the Federal Rules of Criminal Procedure, to which we have referred, have also been repealed. The question of whether these statutes and the rule should now be repealed merits the prompt consideration of Congress and the Rules Committee, but we regard our role as one of proceeding with caution unless and until it unmistakably and clearly appears that *Furman* has had this effect. This, we fail to find.

Watson, 496 F.2d at 1129-1129. The Court then held that the defendant had the statutory right to have two attorneys because he was facing conviction for a crime that authorized the death penalty even though the imposition of the death penalty under federal law as it existed at that time was ineffectual.

McNally, on the other hand, determined that when the death penalty has been determined by a court or the prosecution not to be appropriate because of *Furman*, "the case lost its capital nature" and the defendant was not entitled to the advantage of any procedure which was otherwise required in the prosecution of a capital offense. *McNally*, 485 F.2d at 407. Thus, *McNally* looked at the death penalty provision as solely a penalty provision.

longer constitutional unless they met current schemes offered by the judiciary, the "capital offense" no longer existed. Thus, any legislation that was triggered by the possibility of imposition of the death penalty was not operative until that penalty was again constitutionally imposable. Hence, while the death penalty may be authorized by the legislature, its imposition is constitutionally prohibited; the authorization provision is invalid.

I can accept the penalty rationale more readily than I can the classification rationale because of the concept of severability. It is well-established that a statute may be constitutional in part and unconstitutional in another; and, as long as the unconstitutional provision is severable from the rest of the statute, the constitutional provision will stand with its unconstitutional aspect rejected. *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). But regardless of which rationale one accepts, I believe little argument remains with the fact that *Furman*, at the very least, declared all provisions of statutes authorizing imposition[9] of capital punishment existing at the time of the decision ineffectual. *Gregg v. Georgia,* 428 U.S. at 153, 96 S.Ct. at 2920; *Watson*, 496 F.2d 1125; *In re Ex Parte Bynum,* 294 Ala. 78, 312 So.2d 52 (1975).

All of this precedent tells me that the federal and state courts have exercised caution when called upon to inter-

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[9] The key word here is "imposition". *Furman,* at the very least, declared imposition of the death penalty outside its guidelines unconstitutional. The death penalty was still authorized but its imposition, the ability to effectuate it, was possible only after the development of specific and controlled discretionary guidelines and procedures and the application of those guidelines and procedure by the authorized fact-finder.

pret the impact of *Furman* on a statutory authorization for imposition of the death penalty. Where legislatures have not specifically and affirmatively indicated their intent since *Furman* to authorize imposition of the death penalty by reenacting, reinstating, modifying, or, in some other permissible way, validating the authorization provision in question, these courts have also exercised caution when they have had to determine the applicability of statutes that grant or deny a defendant a procedural right that is dependent upon him facing the possibility of the imposition of the death penalty. In light of this exercise of caution, I believe this Court should also exercise caution in interpreting legislative inaction or implicit ratification of the U.S. Congress when determining whether Article 118's authorization for the imposition of death remains valid since the decision in *Furman*. Although appellate courts act on the presumption of constitutionality of statutory provisions, because the case law since *Furman* has not made it unmistakably clear to me that Article 118's death penalty authorization provision is constitution, I cannot find that it is constitutional. *See United States v. Watson*, 496 F.2d 1125, 1129 (4th Cir.1973). If it is not a constitutionally valid provision because Congress has not affirmatively demonstrated its reinstatement of that penalty provision, let alone given the guidelines required by *Furman-Gregg*, then the imposition of the death penalty within the military justice system is unconstitutional.

III.

Presidential Effectuation Of An Invalid Statutory Provision

Let us presume, however, that Article 118's provision authorizing the death penalty is not void but merely ineffectual. How can it be effectuated? In this particular case, can the President pursuant to Article 36, UCMJ,

effectuate, *i.e.*, make constitutionally permissible, Article 118's authorization for imposition of the death penalty, by promulgating R.C.M. 1004?

In *United States v. Matthews*, 16 M.J. at 354, the Court of Military Appeals held that the sentencing standards then existing under the UCMJ were defective because they failed "to require that the court members make specific findings as to individualized aggravating circumstances – findings which can, in turn, be reviewed factually and legally." *Id.*, at 380. In dicta the Court then indicated how the defective sentencing standards could be corrected:

> Congress can take action to remedy this defect that now exists in the sentencing procedure employed by courts-martial in capital cases. However, corrective action also can be taken by the President in the exercise of his responsibilities as commander-in-chief under Article II, Section 2, and of powers expressly delegated to him by Congress. *See* Article 36, UCMJ, 10 U.S.C. § 836.

The Court further expounded on its theory that the President could take the corrective action needed:

> The congressional delegation of powers to the President has traditionally been quite broad in the field of military justice. Pursuant to Article 36 of the Uniform Code, the President promulgates rules to govern pretrial, trial, and post-trial procedures of courts-martial. Unlike other Federal criminal statutes, the punitive articles of the Uniform Code for the most part authorize punishment "as a court-martial may direct"; no maximum or minimum sentence is specified. (Footnote omitted.) However, as contemplated by Article 56, of the Uniform Code, 10 U.S.C. § 856, the President prescribes maximum punishments for the various offenses. (Citation omitted.) The great

> breadth of the delegation of power to the President by Congress with respect to court-martial procedures and sentences grants him the authority to remedy the present defect in the court-martial sentencing procedure for capital cases. *Cf. Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). Indeed, a proposed revision[10] of the Manual for Courts-Martial, which [is] . . . R.C.M. 1004 . . . prescribes special procedures for sentencing in capital cases.

Matthews, 16 M.J. at 380-381. (Footnote added).

The President heeded the *Matthews* dicta and promulgated R.C.M. 1004. Despite our supervisory court's dicta in *Matthews,* and its apparent anticipatory sanction of the President's action, I believe there is a separation of powers issue that the Court of Military Appeals may not have considered at the time. Additionally, I believe significant case law addressing the separation of powers issue has been decided since *Matthews, see Mistretta v. United States,* __ U.S. __, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989); *INS v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); *Bowsher v. Synar,* 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986); *United States v. Harper,* 729 F.2d 1216 (9th Cir.1984), that impacts upon the continued validity of the dicta such that it may reexamine *Matthews. See United States v. Carter,* 25 M.J. 471, 473 (C.M.A. 1988).

Elementary civics teaches us that:

> . . . the executive department, like the judicial, must yield in most matters to the creative power of the

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[10] The proposed revision of the Manual for Courts-Martial mentioned by the Court of Military Appeals in *Matthews* referred to what ultimately became Rule for Courts-Martial (R.C.M.) 1004, Manual for Courts-Martial (M.C.M.), 1984.

> legislature (footnote omitted); the legislature makes laws and the executive enforces them when made, and each department is, in the main, supreme within its own field of action (footnote omitted). The executive cannot discharge the functions of the legislature in any manner by so acting in his official capacity that his conduct is tantamount to a repeal (. . . *Henry v. State,* 10 Okla.Crim. 369, 136 P. 982), enactment (*Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 . . . ;), variance, or enlargement (*Whitcomb Hotel, Inc. v. California Employment Com.,* 24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405; *Boone v. Kingsbury,* 206 Cal. 148, 273 P. 797, *cert. den.* and *app dismd* 280 U.S. 517, 50 S.Ct. 66, 74 L.Ed.587, and *cert. den.* and *app dismd* 280 U.S. 517, 50 S.Ct. 66, 74 L.Ed. 588). Thus, the President of the United States has no authority, even under the clause requiring him to see that the laws are faithfully executed, to suspend of his own motion the operation of acts of Congress (*Kendal v. United States,* 37 U.S. 524, 9 L.Ed. 1181).

16 Am.Jur.2d sec. 305 at 821-822.

Just as the President cannot legislate, neither can the courts by judicial construction. *See United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). As the majority notes in its equal protection discussion: "In *Gregg* the Supreme Court reasoned that because of the complex issues involved in determining the moral values of society and the social utility of the death penalty, it is particularly within the province of the legislature to establish the degree of punishment for certain classes of crime." This, for me includes, factors that differentiate capital murder from non-capital murder.

Whether an unconstitutional provision of a death penalty statute can be subsequently effectuated with correct

action has been answered affirmatively by *Gregg v. Georgia,* 428 U.S. at 206, 96 S.Ct. at 2940, and *Profitt v. Florida,* 428 U.S. at 242, 96 S.Ct. at 2960, when the Supreme Court approved new statutes enacted by the state legislatures subsequent to *Furman.* The new legislation reaffirmed the legislative policy of the appropriateness of the imposition of the death penalty as to certain categories of crime and channeled the decisionmaking for imposition of the death penalty by establishing certain specified aggravating factors and several procedural safeguards. Positive action to establish or reaffirm policy and to establish standards for channelling decision-making in an attempt to make law as to crime and punishment in compliance with the Constitution is beyond question the sole province of the legislature. *United States v. Wiltberger,* 18 U.S. 76, 5 Wheat. 76 (1820). As with many of Chief Justice Marshall's opinions, the principle he enunciated about the power to legislate being within the sole province of the legislature has remained good law through the years. *Whalen v. United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); *Bell v. United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1954); *United States v. Evans,* 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); *Howell v. Mississippi,* 300 So.2d 774 (1974).

My Brothers give four reasons for their belief that the President can validate the ineffectual provisions of Article 118. First, they rely on the Congressional enactment, unchanged since 1951, of Article 36, UCMJ, which they believe delegates to the President that authority:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of

law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.[11]

Second, they rely on what they consider the expression of congressional intent with regard to the President's authority to set punishments, including the death penalty, as explicitly set forth in Article 56, UCMJ: "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."[12] The third reason is what they believe is recognition of the authority of the President to do so by the Court of Military Appeals in their decision in *Matthews*, 16 M.J. at 354; the President's implementation of that advice; and the Congressional ratification, albeit *sub silentio*, of the provision in question.[13] Finally, the majority

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[11] Some of my Brother judges believe that the President has merely "applied the principles . . . recognized in the trial of criminal cases in the United States district courts, . . . " and that those principles are the guidelines established by the Supreme Court in *Furman* and *Gregg*. My counter-argument is that the courts, including the United States Supreme Court, have recognized that they cannot legislate. *United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984); *see, e.g., Furman*, 408 U.S. at 398, 92 S.Ct. at 2808 (Burger, C.J., dissenting).

[12] The Table of Maximum Punishments, paragraph 127(c), Manual for Courts-Martial, 1951, and 1969, show the President referring to Article 118 for a definition of the maximum punishment permitted for murder rather than him stating it in his own terms as the maximum sentence permissible.

[13] Provisions of the Manual for Courts-Martial made pursuant to Article 36, UCMJ, must be reported to Congress. Article 36(b), UCMJ.

believes that the President has been properly delegated broad authority to effectuate Article 118's death penalty provision because the President's authority as Commander in Chief of the Armed Forces is based upon a long-standing special relationship with the Congress, an historical relationship so unique from any other, that he alone has the expertise to determine what is necessary to maintain morale and discipline within the military. This special relationship, they conclude, enables the President to meet the *Furman* mandate better than any other mechanism.

I do not accept those reasons because of two long standing principles: (1) Congress cannot delegate its legislative power to the President (the nondelegation principle); *Marshall Field and Co. v. Clark,* 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892);[14] and (2) penal rules must be strictly construed.

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[14] Two important facts to remember in this regard are the constitutional provisions speaking about the legislative and executive branch responsibilities toward the armed forces. Article I, section 8, clause 14 states that "The Congress shall have the Power . . . To make Rules for the Government and Regulation of the land and naval Forces." Article II, section 2 states: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . ."

[15] "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislative, not the court, which is to define a crime, and ordain its punishment." *United States v. Wildberger* 18 U.S. 76 5 Wheat. (U.S.) 76, 95, 5 L.Ed. 37, 42 (1820); *Furman v. Georgia,* 408 U.S. at 452-453, 92 S.Ct. at 2835-36 (Powell, J., dissenting). Additionally, "[t]he Supreme Court is most likely to reject broad delegations of congressional power, typically on statutory grounds, when action of the government agency claiming delegated

In *United States v. United Verde Copper Co.*, 196 U.S. 207, 25 S. Ct. 222, 49 L.Ed. 449 (1905), the Supreme Court applied the nondelegation principle to the executive branch. In *United Verde* the Secretary of the Interior had established regulations under the supposed authority of Congress to implement an act of Congress. In doing so, he tried to give "an authoritative and final construction of the statute" and in doing that the Court said:

> If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation: it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary.

196 U.S. at 212, 25 S.Ct. at 225.[16]

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power touches constitutionally sensitive areas of substantive liberty." Tribe, AMERICAN CONSTITUTIONAL LAW, (2d Edition, 1988) at p. 365. What more constitutionally sensitive area of substantive liberty can there be than an individual's life? *See California v. Romas*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) and cases cited in n. 9, *e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 117-8, 102 S.Ct. 869, 877-8, 71 L.Ed.2d 1 (1982).

[16] In *United States v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911), the Supreme Court upheld the action of the Secretary of Agriculture's use of his legislatively delegated powers in making criminal the violation of rules and regulations made and promulgated by him under the authority of a statute covering forest reservations. The Court reiterated that only Congress can legislate and quoting its previous opinion in *Marshall Field and Co. v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892) stated:

> The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make iys own action depend. to deny this would be to stop the wheels of government. There are many things upon which wise and useful legisla-

In *Reid v. Covert,* 354 U.S. 1, 38-39, 77 S.Ct. 1222, 1241-42, 1 L.Ed.2d 1148, 1172 (1957), the President's authority to act in his capacity as Commander in Chief with regard to the administration of military justice specifically was addressed:

> It must be emphasized that every person who comes within the jurisdiction of courts-martial is subject to military law—law that is substantially different from the law which governs civilian society. Military law is, in many respects harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice. Moreover, it has not yet been definitely established to what extent the President, as Commander in Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war . . . . If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

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tion must cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside the halls of legislation.

Grimaud, 220 U.S. at 519, 31 S.Ct. at 484, 55 L.Ed. at 569. The Court then explained that while the act of Congress in question did not expressly declare the particular activity in question unlawful, the statutes involved did have encompassing terms and expressly stated that failure to comply with the rules and regulations of the Secretary would subject the offender to the penalty imposed by Congress.

> In summary, "it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." In part this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual. (Footnotes omitted). The President's authority as head of the executive branch and as Commander in Chief is, therefore, not unfettered authority.

See also Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 671, 100 S.Ct. 2844, 2878, 65 L.Ed.2d 1010, 1052 (1980); *Textile Manufacturers Institute, Inc. v. Donovan,* 452 U.S. 490, 543, 101 S.Ct. 2478, 2507, 69 L.Ed.2d 185, 222 (1981).

Using these principles to analyze the authority of the President by virtue of Article 36 to promulgate R.C.M. 1004, we must address two issues. First, anticipating that the Supreme Court's recognition that there are "inherent differences in values and attitudes [which] exist that separate the military establishement from the civilian society" might be considered a means by which the President could be "inferred" to understand "the intent" of Congress and thus allow him, under the rubric of his special relationship with Congress, to effectuate *Furman-Gregg* criteria for the imposition of the death penalty, let us examine Article 118 to see if there are inherent differences that would separate the former from the latter. In other words, do inherent differences in values and attitudes exist that separate the military from the civilian

community such that imposition of the death penalty in the former and not the latter is constitutionally permissible? I have no doubt that they do. But, I do doubt, that the differences, at least during peacetime, are so inherent that Congress need not itself establish *Furman-Gregg* criteria.[17]

I am not at all certain that murder, at least the two types of murder that concern us in appellant's case,[18] or even the particular circumstances surrounding the commission of that offense by this particular appellant as alleged, including the aggravating factors plead and found in the charge and specifications, identify any values or attitudes so different as to separate the military establishment from the civilian society. In fact, I believe the Court of Military Appeals has already addressed this issue.

In *United States v. Matthews,* 16 M.J. at 354, the Court recognized that circumstances might exist which would permit rules governing capital punishment to be different from those applicable to civilians. But, in Matthews' situation, the murder and rape of a civilian dependent, offenses which the court was unable to relate to military exigencies, the Court found:

> [N]o reason why Matthews should be executed for his [crimes] if the sentencing procedures used by the court-martial failed to meet the standards established by the Supreme Court for sentencing in capital cases in civilian courts. There is no military necessity for such a distinction; and we do not believe that apply-

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[17] On the other hand, if we could identify a difference in values and attitudes, then, maybe, Presidential action in establishing the aggravating factors in R.C.M. 1004(c) would be justified.

[18] Prededitated murder (Article 118(1)) and murder during the commission of a felony (Article 118(4).

> ing lower standards in this case would conform to the intent of Article 55 or of the Eighth Amendment.

Matthews, 16 M.J. at 369.[19] The only difference between Matthews and appellant is that the President has since promulgated R.C.M. 1004. Otherwise, the offense of murder is the same.[20] Thus, I do not believe that sufficient differentiating values and attitudes have been adequately identified, let alone identified as inherent, to permit the death penalty to be effectuated by the President rather than by the Congress.

IV.

IS THERE A PROPER DELEGATION?

Even if, based on the facts of this particular case, those differentiating values and attitudes are identified ade-

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[19] Recognizing that the Court of Military Appeals made this statement in applying the principle to the issue of cruel and unusual punishment rather than a delegation of power issue, it would seem to me that the same type of justification would have to be used under an equal protection argument if proper authority did establish procedures for imposition of the death penalty for service members that differed from that of their civilian counterparts. I do not address, therefore, the issue of whether military status alone is sufficient to overcome any equal protection arguments to permit the imposition of the death penalty on service members and not civilians for offenses committed under the same nine similar circumstances.

[20] One could argue that the primary victim in appellant's case is his officer-in-charge and his dependent civilian wife while Matthews murdered a civilian dependent of an Army officer. The status of appellant's victim as officer-in-charge could have been one of the aggravating factors under the President's scheme but was not plead. Thus, the victim's officer status, which might have created that military significance, was not used by the Government at trial and cannot now be used as a means to differentiate appellant's case from Matthews situation on the basis of a special need of the military.

quately and are inherent to the military, the process by which that identification is validated must be by a proper delegation.[21] There is nothing in the congressional delegation in Article 36, UCMJ, that can be pointed to that would demonstrate tht the identification of the differentiating values and attitudes was proper. *See United States v. Robel,* 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); *O'Neal v. United States,* 140 F.2d 908 (6th Cir. 1944).

It may well be true that the standards set forth in R.C.M. 1004 meet the guidelines set forth in *Gregg v. Georgia,* 428 U.S. at 153, 96 S. Ct. at 2909, *e.g.*, aggravating factors and procedural safeguards are present; and, it would appear that the concerns of the Court of Military Appeals have been eliminated. But, the President's arbitrary promulgation of such rules without guidance from the legislature that results in the effectuation of an otherwise unconstitutional statutory provision is not a proper application of the delegation process. *See The Aurora v. United States,* 11 U.S. 382, 7 Cranch 382, 3 L.Ed. 378 (1813). In the numerous cases cited by the Supreme Court since *Aurora,* those that upheld a

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[21] As we have previously noted, the military justice system is dependent upon both the legislative and executive branch for its creation and effectuation. *See* Footnote 14. Therefore, since Congress was endowed with the authority "to make rules and regulations for the governing" of the armed services, the Congress legislates and the President, as head of the executive branch and as commander in chief of the armed forces, enforces that legislation. Where Congress has failed to express an intent to require certain action, *e.g.*, require the taking of an oath to demonstrate bona fides at the time of submission of an application to an executive agency, the executive could not then prescribe that violation of the requirement would result in criminal penalty. *Williamson v. United States,* 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278 (1907).

statutory delegation on grounds that the acts complained of were not a result of improper delegation, were based on statutes that had provided specific guidelines upon which the President was to base his action and which prevented the executive from taking what the courts considered arbitrary action; and most importantly, the President or a member of the executive branch took his action in accordance with those statutory guidelines. *See, e.g., Union Bridge Co. v. United States,* 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523 (1907); *Marshall Field and Co. v. Clark,* 143 U.S. at 649, 12 S.Ct. at 495; *United States v. Gordon,* 580 F.2d 827 (5th Cir.1978); *United States v. Pastor,* 557 F.2d 930 (2d Cir. 1977). *See also* Annotation, "Validity of Statute or Ordinance Vesting Discretion in Public Officials without Prescribing a Rule of Action," 92 A.L.R. 400; Annotation, "Validity of Delegation to Drug Enforcement Administration of Authority to Schedule or Reschedule Drugs Subject to Controlled Substance Act (21 U.S.C. §§ 801 et seq.)," 47 A.L.R.Fed. 869.

In *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935), the Supreme Court established a three-stepped analysis to determine whether the President's authority, exercised in light of a congressional delegation, was too broad:

> . . . we look to the statute to see whether the Congress has declared a policy with respect to that subject, whether the Congress has set up a standard for the President's action, whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.

293 U.S. at 415, 55 S.Ct. at 246, 79 L.Ed. at 456. The Supreme Court recently breathed new life into *Panama* in the realm of criminal punishments. *Mistretta v. United States,* __ U.S. __, 109 S. Ct. 647, 102 L.Ed.2d 714 (1989).

Using *Panama's* three-stepped analysis as recently applied by *Mistretta,* I find Articles 36, 56, and 118 itself so deficient that reliance on an Article 36 delegation as a proper congressional delegation to the President for effectuating guidelines that would authorize the imposition of the death penalty within the military justice system is misplaced and improper. This is particularly so when such a delegation relates to the imposition of the supreme and ultimate penalty.[22]

First, I do not believe that Congress has set a policy with regard to the imposition of the death penalty for Article 118 since *Furman.* In fact, the only offenses for which the Congress has been able to obtain a consensus for imposition of the death penalty in appropriate circumstances have been in connection with air piracy [49 U.S. C.A. §§ 1472(i)(1)(B), 1472(n)(1)(B)] and espionage by military personnel [Article 106a UCMJ, 10 U.S.C. § 906a]. *See Gubiensio-Ortiz v. Kanahele,* 857 F.2d 1245 (9th Cir. 1988); *see also Thompson v. Oklahoma,* – U.S. –, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (O'Connor J., concurring in judgment). My failure to presume that Congress has set a general death penalty policy is also based on recognition of the public controversy surrounding capital punishment, at least as to some offenses, and the reluctance of the federal courts and the United States Sentencing Commission to presume the will of Congress in light of possible adverse congressional reaction. *See Gubiensio-Ortiz,* 857 F.2d at 1256.

Second, I do not believe that we can presume, as the majority would have us, that because of a presidential re-

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[22] And, it is only to the imposition of the death penalty that my dissent applies. I offer no comment on the validity of the delegation with regards to other matters that may arise within the military justice system at a later time.

porting requirement, the Congress has given tacit approval or has ratified the presidential promulgation of R.C.M. 1004. The Supreme Court has clearly stated that when "substantial restraints are being placed on constitutional procedures" and they are "in conflict with our long-accepted notions of fair procedures, such action must be based upon explicit, not implicit, authority. Such decisions cannot be assumed by acquiescence or non-action." *Greene v. McElroy,* 360 U.S. 474, 507, 79 S.Ct. 1400, 1419, 3 L.Ed.2d 1377, 1396-97 (1959). The *Greene* Court further enunciated the significance of explicit action on the part of Congress:

> They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized (citation omitted), but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with the authority to decide them.

Id. at 507, 79 S.Ct. at 1419, 3 L.Ed.2d at 1397.

In *Greene v. McElroy,* the petitioner's work opportunities were being severly limited by the Department of Defense without affording him a hearing that comported with "our traditional ideas of fair procedures." In appellant's case, he is being subjected to the imposition of the death penalty without being afforded the constitutional assurance that imposition of such an extreme penalty is a current policy adopted by the branch of government established to determine such policy.

Thus, I conclude that Congress has not set a policy with regard to imposition of capital punishment in the military justice system since *Furman*. I further conclude, upon examination of Article 36, that no standards were set by the Congress with regard to what factors the President should apply in determining when the imposition of the death penalty would be authorized. As to the third step in a *Panama* analysis, I could conclude that the Presidential finding requirement has been met, since only the President can order the punishment of death executed. R.C.M. 1207, *see* Article 71(a), UCMJ. Therefore, having failed to meet two of the three steps required by *Panama,* I find that the President's authorization of imposition of capital punishment pursuant to findings made in accordance with R.C.M. 1004 is based upon an unconstitutional delegation of authority.

V.

LIMITATION OF ARTICLE 36, UCMJ

Throwing caution to the winds, however, let's do some further analysis by assuming that Congress did establish a death penalty policy, at least with respect to Article 118, and did intend to delegate to the President under Article 36, UCMJ, the ability to correct provisions of the UCMJ held ineffectual until the *Furman* mandate was complied with. The congressional delegation must still be examined because it must be capable of proper application by the President. In order to ensure that proper application, the delegation must establish certain standards for the President to follow when he acts pursuant to the delegation.[23]

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[23] For example, compare Article 36, UCMJ (quoted *infra*) with the Federal Sentencing Commission Act wherein the Congress set forth categories for determining offenses, categories for determining categories of defendants, four purposes, three goals, and a specific

I find that the standards enunciated by Congress are either non-existent or very restrictive. When one examines the judicial opinions addressing delegation after *Panama,* and in particular when one examines the delegation by Congress to the Sentencing Commission, as described at great length in *Mistretta,* one finds the standards enunciated by the Congress must be specific and detailed.[24]

Looking at Article 36, however, I fail to find such specific and detailed standards. I do find that the matters which Congress delegated to the President are very general and involve matters of procedure, not matters involving substantive law.[25] *Ellis v. Jacob,* 26 M.J. 90 (C.M.A. 1988); *United States v. Frederick,* 3 M.J. 230 (C.M.A. 1977). This fact provides another ground for my conclusion that R.C.M. 1004 is an improper basis upon which to authorize imposition of the death penalty.

The aggravating factors set forth in R.C.M. 1004(c) are matters of substantive law and not procedure. Two Supreme Court opinions serve as the judicial authority for this conclusionary statement. *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) and

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tool, etc. *See Gubiensio-Oritz v. Kanahele,* 857 F.2d at 1245, *see also* Annotation, "Validity of Delegation to Drug Enforcement Administration of Authority to Schedule or Reschedule Drugs Subject to Controlled Substances Act (21 USC §§ 801 et seq.)," 47 ALR Fed 869.

[24] Sentencing Reform Act of 1984, as amended 18 U.S.C. § 3551 *et seq.* (1982 ed., Supp. IV), and 28 U.S.C. §§ 991-998 (1982 ed., Supp. IV).

[25] While we believe rules of evidence involve substantive law, the congressional delegation is a little more specific in that it directs the President to adopt rules that apply to trials in federal district courts – which we recognize as the Federal Rules of Evidence, rules enacted by the Congress, and upon which the Military Rules of Evidence were based, with some modification, due to the needs of the military law practice. Appendix 22, Analysis, MCM, 1984.

California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

In *Bullington* the Supreme Court referred to the Missouri statute that enacted death penalty legislation after the *Furman* decision as containing "substantive standards to guide the discretion of the sentencer" and affording "procedural safeguards to the convicted defendant." 451 U.S. at 433, 101 S.Ct. at 1853, 68 L.Ed.2d at 275.[26] The statute that the *Bullington* court examined had

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[26] I disagree with the Government's contention and the majority's interpretation that the Supreme Court considered the aggravating factors procedural matters in *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). The *Kobbert* Supreme Court was addressing the factual situation involving a change in the role of the judge and jury in the imposition of the death penalty. I agree that the change in the roles made by the Florida legislature involved procedural matters; but, a determination that a change in role is procedural is far different from determining that the identification of certain factors are sufficiently aggravating as to make an individual eligible for the judge or jury to impose the death penalty is also a procedural matter. Additionally, the Florida statute had previously passed constitutional muster, both as to the aggravating factors to be considered and the procedural application of determining the presence of aggravating factors before imposition of the death penalty was authorized *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, *reh'g den.*, 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

Additionally, the Florida statute, which not only changed the role of judge and jury, but also identified aggravating factors which had to be found before the death penalty could be imposed, was enacted by the legislature and not by someone in the executive acting under a delegation of authority. Thus, no separation of powers—improper delegation or usurpation of authority—issue was or could be raised by the defendant in *Dobbert*. The only issue of concern for the Court was whether the change in the Florida statute violated *ex post facto* principles. The statutory changes served to ameliorate the appellant's potential for imposition of the death penalty because it provided "significantly more safeguards to the defendant than did the old. . . .

two separate provisions. One addressed purely procedural issues, such as the requirement for a bifurcated trial, the jury's requirement to hear additional evidence in extenuation, mitigation, and aggravation. Additionally, this provision provided the judge with guidelines as to what he was to instruct the jury and his role in the proceedings after jury had made its decision. The second provision of the statute dealt with the legislature's specification of 10 aggravating and 7 mitigating circumstances which the jury had to find in writing and be convinced beyond a reasonable doubt that "any aggravating circumstance or circumstances that it finds to exist are sufficient to warrant imposition of the death penalty." *Bullington,* 451 U.S. at 434, 101 S.Ct. at 1853, 68 L.Ed.2d at 276. After careful analysis of *Bullington,* I believe the Court's "procedure" label—as interpreted by appellate Government counsel in their argument before this court—was meant to apply to the change in procedure caused by the new legislation, *i.e.,* the new state statute gave the jury rather than the judge the responsibility for determining the presence of the statutorily created aggravating factors. The Court's "procedure" label had nothing to do with the establishment of the aggravating factors themselves. I base this conclusion on the fact that the Court expounded on its determination that the provisions of the statute almost equated to a trial on the merits, particularly with the use of the beyond a reasonable doubt standard. "By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has

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Hence, viewing the totality of the procedural changes wrought by the new statute, we conclude that the new statute did not work an onerous application of an *ex post facto* change in the law." 432 U.S. at 295-6, 97 S.Ct. at 2301, 53 L.Ed.2d at 358.

'proved its case.' " 451 U.S. at 444, 101 S. Ct. at 1858, 68 L.Ed.2d at 282. As a result the Court stated that "it is the State, not the defendant, that should bear 'almost the entire risk of error.' " 451 U.S. at 4467, 101 S.Ct. at 1859, 68 L.Ed.2d at 283. It thus held that the State was not entitled, at defendant's second trial, to attempt to prove the aggravating factors it had failed to prove at his first sentencing hearing since he had, in reality, been found not guilty beyond a reasonable doubt of those aggravating factors. R.C.M. 1004 is almost identical to that Missouri statute, except for the specific aggravating and mitigating factors listed in the Missouri statute. Indeed, the Ninth Circuit Court of Appeals, *en banc,* recently held that Arizona's statute requiring the finding of aggravating factors beyond a reasonable doubt was unconstitutional because it placed with the trial judge the duty of finding the aggravating factor when it should have been the duty of the jury. The Court determined it should be the jury's decision because the aggravating factors were like elements of the offense. As such the defendant ws entitled, in light of the Sixth Amendment, to a jury determination of the existence of those aggravating factors. *Adamson v. Ricketts,* 865 F.2d 1011 (9th Cir. 1988).

In *California v. Ramos,* Justice O'Connor, writing for a majority Court explained the court's present interpretation of *Gregg:*

> *In Gregg* itself, the joint opinion of Justices STEWART, POWELL and STEVENS concluded that the Georgia sentencing scheme met the concerns of *Furman* by providing a bifurcated proceeding, instruction on the factors to be considered, and meaningful appellate review of each death sentence. (citation omitted.) Satisfied that these *procedural* (emphasis added) safeguards "suitably directed and

> limited" the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." (citation omitted), the joint opinion did not undertake to dictate to the State the particular *substantive* (emphasis added) factors that should be deemed relevant to the capital sentencing decision. Indeed, the joint opinion observed: "It seems clear that the problem [of channeling jury discretion] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." (Citation omitted.) ("The deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy' "). (Footnote: Moreover, in approving the sentencing schemes of Georgia, Florida, and Texas, the joint opinions of Justices Stewart, POWELL, and STEVENS did not substitute their views for those of the state legislatures as to the particular *substantive* (emphasis added) factors chosen to narrow the class of defendants eligible for the death penalty. . . .)
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> It would be erroneous to suggest, however, that the Court has imposed no *substantive* (emphasis added) limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate.

463 U.S. at 1000, 103 S.Ct. at 3452-53, 77 L.Ed.2d at 1180.

The majority states that Article 36 "clearly delineates the general policy to prescribe pretrial, trial, and post-trial procedures for cases tried by courts-martial," and "clearly states that the authority is delegated to the President," and

"does establish specific boundaries to limit the President's action under this provision" because the President "is bound to apply the principles of law recognized in criminal trials in the United States district courts." While I agree with that statement as far as it goes, the statement is flawed in that the United States district courts have no capital punishment principles to apply. Congress has not passed any federal legislation establishing *Furman*-type factors for federal capital offenses in general, but has for the specific crimes of aircraft piracy and espionage by military personnel; but in doing so, specified the aggravating factor(s) that had to be found before death could be imposed.

Although the United States district courts must follow the *Furman* mandate when interpreting capital punishment statutes, as must we, the district courts—despite the validity or invalidity of any substantive-procedural distinctions—cannot establish the aggravating factors where none have been enacted by the Congress. *See United States v. Harper,* 729 F.2d 1216 (9th Cir. 1984). Likewise, if a federal district court cannot effectuate an unconstitutional death penalty provision, neither can the President, pursuant to Article 36, which requires him to follow, insofar as practicable, the principles of law recognized in trials of criminal cases in United States district courts. Article 36, UCMJ.

Furthermore, Article 36's delegation is additionally limited by Article 56, UCMJ, for while giving authority to the President to prescribe maximum punishments, it does so in terms of non-capital offenses. That the President's authority to prescribe maximum punishments is limited to non-capital offenses is supported not only by the legislative history of Article 56 but in fact by the

President's own past actions.[27] Since the inception of the UCMJ and the promulgation of the first Manual for Courts-Martial, the provisions relating to the maximum punishments authorized for particular offenses—the Table of Maximum Punishments in MCM 1951 and 1969—have never addressed the punishments authorized for those offenses described in the various articles that authorize the imposition of the death penalty, even where life imprisonment is a mandatory lesser sentence. Therefore, since offenses carrying the death penalty are capital offenses, the President does not have the authority to prescribe anything which might effect the maximums

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[27] I recognize that the Court of Military Appeals in *United States v. Flucas*, 23 U.S.C.M.A. 274, 275, 49 C.M.R. 449, 450 (1975), held that the President acted with proper authority when pursuant to Article 36, UCMJ, he established the "element" of knowledge for the offense of assault, he provided "an aggravating factor increasing the maximum permissible punishment 'when the victgim has a particular status or is performing a special function.' Paragraph 207b, MCM 1969." I can, however, distinguish *Flucas* on one simple ground—the death penalty is so unique that it requires different treatment. As Justice Stewart stated in his concurring opinion in *Furman*, 408 U.S. at 306, 92 S.Ct. at 2760, 33 L.Ed.2d at 388:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

See Dix, "Appellate Review of the Decision to Impose Death," 68 Geo.L.J. 97, 109 (1979).

Additionally, the punishment statute—Article 56—is clear on its face and it does not pertain to the death penalty. Thus, the principles of strict statutory construction apply. *United States v. Jenkins*, 7 U.S.C.M.A. 261, 262, 22 C.M.R. 51, 52 (1956).

with regard to Article 118, most particularly the aggravating factors that determine whether one convicted of a capital offense is eligible for consideration of imposition of the death penalty. If the President could prescribe the aggravating factors which make a person eligible for imposition of the death penalty, he would place a maximum on all other situations wherein a death occurs as the result of a criminal act for which Congress has authorized the death penalty. He would thus act contrary to congressional intent and his authority under Article 56. *See Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *United States v. United Verde,* 196 U.S. at 207, 25 S.Ct. at 222; *United States v. McCormick,* 12 U.S.C. M.A. 26, 30 C.M.R. 26 (1960). While it is true that such an action accrues to the benefit of some capital offenders, without the proper authority or specific guidance of Congress, the President not only usurps authority but places other capital offenders in jeopardy when Congress may not have intended such unequal classification.[28]

A further indication that Congress and not the President is the proper authority for prescribing the aggravating factors, and a recognition by Congress of its responsibilities in this arena, is the 1986 enactment of Article 106a, 10 U.S.C. § 906a. Not only did Congress establish espionage as a capital offense, it also set forth within the statute itself, the aggravating factors that had to be found before imposition of the death penalty could be adjudged.[29] In that statute the Congress further delegated

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[28] I also make no judgment on equal protection of the law questions such as that posed by appellant. I find it unnecessary to my resolution of this case.

[29] If Congress had tacitly approved or ratified R.C.M. 1004, as offered by the majority, why was it necessary for the Congress to set forth specific aggravating factors for Article 106a, UCMJ, a post-*Furman* statute?

to the President the authority to prescribe other aggravating factors under Article 36.[30]

VI.

SUMMARY

In summary, I find that the Article 118 provision authorizing the imposition of the death penalty is unconstitutional and therefore invalid because of *Furman* and its progeny. I further find that the President's attempt in 1984 to effectuate that invalid authorization by promulgation of the aggravating factors set forth in R.C.M. 1004(c) pursuant to the authority vested in him by Articles 36 and 56, as they presently exist, was ineffectual because such delegation was constitutionally impermissible in the first place, or was an improper delegation by the Congress in the second.

Accordingly, while I approve the findings, I would disapprove the death penalty as approved on review below as a matter of law and approve only so much of the sentence as provides for dishonorable discharge, life imprisonment, forfeitures of all pay and allowances and reduction to pay grade E-1.

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[30] The propriety of that additional delegation is a matter for future resolution, if necessary.

APPENDIX C

Rule for Courts-Martial 1004 as Originally Promulgated by Executive Order No. 12,473, 49 Fed. Reg. 17,152 (1984)
Rule 1004. Capital cases

(a) In general, Death may be adjudged only when:

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of was; and

(2) The requirements of subsections (b) and (c) of this rule have been met.

(b) Procedure. In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—

(1) Notice. Before arraignment, trial counsel shall give the defense written notice of which aggravating circumstances under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating circumstances under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating circumstances unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) Evidence of aggravating circumstances. Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating circumstances in subsection (c) of this rule.

(3) Evidence in extenuation and mitigation. The accused shall be given broad latitude to present evidence in extenuation and mitigation.

(4) Necessary findings. Death may not be adjudged unless the members find:

(A) Beyond a reasonable doubt that one or more of the aggravating circumstances under subsection (c) of this rule existed; and

(B) That any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances including such circumstances under subsection (c) of this rule as the members have found existed.

(5) Basis for findings. The findings in subsection (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(6) Instructions. In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members on such aggravating circumstances under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) Voting. In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating circumstances under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating circumstance. After voting on all the aggravating circumstances on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) Announcement. If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating circumstances under subsection (c) of this rule were found by the members.

(c) Aggravating circumstances. Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating circumstances;

(1) That the offense was committed before or in the presence of the enemy, except that this circumstance shall not apply in the case of a violation of Article 118 or 120;

(2) That in committing the offense the accused intended to:

(A) Cause substantial damage to the national security of the United States; or

(B) Cause substantial damage to a mission, system, or function of the United States, provided that this subsection shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this circumstance shall not apply in the case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under circumstances that the lives of persons other than the victim, if any, were unlawfully and substantially endangered, except that this circumstance shall not apply to a violation of Article 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress or Member-of-Congress elect, or any judge of the United States;

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim;

(J) The accused has been found guilty in the same case of another violation of Article 118;

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing;

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim;

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense.

For purposes of this rule, 'national security' means the national defense and foreign relatins of the Uhited States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within of without.

(d) Spying. If the accused has been found guilty of spying under Article 106, subsections (a)(2), (b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

(e) Other penalties. Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal, as appropriate. Confinement is a necessary incident of a sentence of death but not a part of it.

APPENDIX D

Rule For Courts-Martial 1004
Drafters' Analysis

Rule 1004. Capital cases

Introduction. This rule is new. It provides additional standards and procedures governing determination of a sentence in capital cases. It is based on the President's authority under Articles 18, 36, and 56. *See also* U.S. Const. Art. II, sec. 2, cl. 1.

This rule and the analysis were drafted before the Court of Military Appeals issued its decision in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) on October 11, 1983. There the court reversed the sentence of death because of the absence of a requirement for the members to specifically find aggravating circumstances on which the sentence was based. When this rule was drafted, the procedures for capital cases were the subject of litigation in *Matthews* and other cases. *See e.g., United States v. Matthews*, 13 M.J. 501 (A.C.M.R. 1982), *rev'd, United States v. Matthews, supra; United States v. Rojas*, 15 M.J. 902 (N.M.C.M.R. 1983). *See also United States v. Gay*, 16 M.J. 586 (A.F.C.M.R. 1982), *cert. for review filed*, 16 M.J. 160 (1983) (decided after draft MCM was circulated for commment). The rule was drafted in recognition that, as a matter of policy, procedures for the sentence determination in capital cases should be revised, regardless of the outcome of such litigation, in order to better protect the rights of servicemembers.

While the draft Manual was under review following public comment on it (*see* 48 Fed. Reg. 23688 (1983)), the *Matthews* decision was issued. The holding in *Matthews* generated a necessity to revise procedures in capital cases.

However, *Matthews* did not require substantive revision of the proposed R.C.M. 1004. The several modifications made in the rule since it was circulated for comment were based on suggestions from other sources. They are unrelated to any of the issues involved in *Matthews*.

Capital punishment is not unconstitutional *per se*. *Gregg v. Georgia*, 428 U.S. 153 (1976); *United States v. Matthews, supra*. Capital punishment does not violate Article 55. *Compare* Article 55 *with* Articles 85, 90, 94, 99-102, 104, 106, 110, 113, 118, and 120. *See United States v. Matthews, supra. But cf. id.* at 382 (Fletcher, J., concurring in result) (absent additional procedural requirements, sentence of death violated Article 55). The Supreme Court has established that capital punishment does not violate the Eighth Amendment (U.S. Const. amend. VIII) unless it: "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than a purposeless and needless imposition of pain and suffering"; "is grossly out of proportion to the crime" (*Coker v. Georgia*, 433 U.S. 584, 592 (1977)); or is adjudged under procedures which do not adequately protect against the arbitrary or capricious exercise of discretion in determining a sentence. *Furman v. Georgia*, 408 U.S. 238 (1972). *Cf. Barclay v. Florida*, 463 U.S. 939 (1983); *Zant v. Stephens*, 462 U.S. 862 (1983); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia, supra. See United States v. Matthews, supra.* Furthermore, while the procedures under which death may be adjudged must adequately protect against the unrestrained exercise of discretion, they may not completely foreclose discretion (at least in most cases, *see* subsection (e), *infra*) or the consideration of extenuating or mitigating circumstances. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978);

Roberts (Harry) v. Louisianna, 431 U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). In *Matthews* the Court of Military Appeals suggested that similar considerations apply with respect to Article 55's prohibitions against cruel and unusual punishment. *United States v. Matthews, supra* at 368-69, 379-80.

The Court of Military Appeals listed several requirements for adjudication of the death penalty, based on Supreme Court decisions: (1) a separate sentencing procedure must follow the finding of guilt of a potential capital offense; (2) specific aggravating circumstances must be identified to the sentencing authority; (3) the sentencing authority must select and make findings on the particular aggravating circumstances used as a basis for imposing the death sentence; (4) the defendant must have an unrestricted opportunity to present mitigating and extenuating evidence; and (5) mandatory appellate review must be required to consider the propriety of the sentence as to the individual offense and individual defendant and to compare the sentence to similar cases within the jurisdiction. *See United States v. Matthews, supra* at 369—77 and cases cited therein.

The Supreme Court has not decided whether *Furman v. Georgia, supra* decisions concerning capital punishment apply to courts-martial. *See Schick v. Reed*, 419 U.S. 256 (1974). *But see Furman v. Georgia, supra* at 412 (Blackmun, J., dissenting); *id.* at 417-18 (Powell, J., dissenting). *See generally* Pfau and Mihizer, *The Military Death Penalty and the Constitution: There is Life After Furman*, 97 Mil. L. Rev. 35 (1982); Pavlick, *The Constitutionality of the U.C.M.J. Death Penalty Provisions*, 97 Mil. L. Rev. 81 (1982); Comment, *The Death Penalty in Military Courts: Constitutionally Imposed?* 30 UCLA L. Rev. 366 (1982); Dawson, *Is the Death Penalty in the Military Cruel and Unusual?*, 31 JAG J. (Navy) 53 (1980); English, *The Constitutionality of the Court-Martial Death Sentence*, 21 A.F.L. Rev. 552 (1979).

The Court of Military Appeals held in *United States v Matthews, supra,* that the requirements established by the Supreme Court for civilian cases apply in courts-martial, at least in the absence of circumstances calling for different rules, such as combat conditions or wartime spying. *United States v. Matthews, supra* at 368. The court added that current military capital sentencing procedures are constitutionally adequate in the following respects: (1) there is a separate sentencing process in which the members are instructed by the military judge as to their duties; (2) certain aggravating factors (e.g., premeditation) must be found by the members during findings, and evidence of other aggravating circumstances may be submitted during sentencing; (3) the accused has an unlimited opportunity to present relevant evidence in extenuation and mitigation; and (4) mandatory review is required by a Court of Military Review, and the Court of Military Appeals, with further consideration by the President, *United States v. Matthews,* supra at 377-78. The court held, that the procedure is defective, however, in that the members are not required to "specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty," *id.* at 379, at least with respect to a peacetime murder case. *See id.* at 368.

The Court of Military Appeals stated in *Matthews* that the constitutionally adequate procedures for capital cases may be promulgated by the President. *Id.* at 380-81. The President's unique authority over military justice, particularly its procedure and punishments is well established. *See* U.S. Const. Art. II, sec. 2, cl. 1; Articles 18, 36, and 56. Congress recently reaffirmed the broad scope of this Presidential authority. *See* Pub. L. No. 96-107, Title VIII, § 80(b), 93 Stat. 811 (Nov. 9, 1979); S. Rep. No. 107, 96th Cong., 1st Sess. 123-125 (1979); *Hearings on S. 428 Before the Military Personnel Subcomm. of the House Comm. on*

Armed Services, 96th Cong., 1st Sess. 5-6, 14, 17-18, 20-21, 52, 106(1979). *See also United States v. Ezell,* 6 M.J. 307, 316-17 (C.M.A. 1978); W. Winthrop, *Military Law and Precedents* 27-33 (2d ed. 1920 reprint). *Cf. Jurek v Texas, supra* (judicial construction may save an otherwise defective death penalty provision). The changes made in this rule are procedural. *See Dobbert v. Florida,* 432 U.S. 282 (1977).

R.C.M. 1004 is based on the recognition that, in courts-martial, as in civilian prosecutions, death should be adjudged only under carefully tailored procedures designed to ensure that all relevant matters are thoroughly considered and that such punishment is appropriate.

At the same time, R.C.M. 1004 rests on the conclusion that the death penalty remains a necessary sanction in courts-martial and that it is an appropriate punishment under a broader range of circumstances than may be the case in civilian jurisdictions. This is because of the unique purpose and organization of the military, and its composition and the circumstances in which it operates. *Cf. Parker v. Levy,* 417 U.S. 733 (1974). *See also United States v. Matthews, supra* at 368.

★ *February 1986 Amendment:* The Rule was amended to substitute the word "factor" for the word "circumstance" with respect to the aggravating factos under R.C.M. 1004(c). This will more clearly distinguish such factors from the aggravating circumstances applicable to any sentencing proceeding under R.C.M. 1001(b)(4), which may be considered in the balancing process in capital cases under R.C.M. 1004(b)(4)(B).

(a) *In general,* Subsection (1) is based on the code and reflects the first of two "thresholds" before death may be adjudged; the accused must have been found guilty of an offense for which death is authorized.

★ *February 1986 Amendment:* Subsection (2), referred to below in the original Analysis, was redesignated as subsection (3), and a new subsection (2) was added. The new subsection requires a unanimous verdict on findings before the death penalty may be considered. Nothing in this provision changes existing law under which a finding of guilty may be based upon a vote of two-thirds of the members, and a finding based upon a two-thirds vote will continue to provide the basis for sentencing proceedings in which any sentence other than death may be imposed. This is an exercise of the President's powers as commander-in-chief, and is not intended to cast doubt upon the validity of the sentence in any capital case tried before the effective date of the amendments.

Subsection (2) refers to the remaining tests in subsections (b) and (c) of the rule: the prosecution must prove, beyond a reasonable doubt, the existence of one or more aggravating circumstances listed in subsection (c) of the rule. Only if this second threshold is passed may the members consider death. If the members reach this point, their sentencing deliberations and procedures would be like those in any other case, except that the members must apply an additional specific standard before they may adjudge death. *See* subsection (b)(3) of this rule.

This rule thus combines two preliminary tests which must be met before death may be adjudged with a standard which must be applied before death may adjudges. *Cf. Barclay v. Florida* and *Zant v. Stephens,* both *supra.* The Working Group considered the capital punishment provisions of those states which now authorize capital punishment, as well as the *ALI Model Penal Code* § 201.6(3),(4)(Tent. Draft No. 9, 1959) (quoted at *Gregg v. Georgia, supra* at 193 n.44). The ABA Standards do not include specific provisions for capital punishment. *See ABA Standards, Sentencing Altervatives and Procedures*

§ 18-1.1 (1979). This rule is not based on any specific state statute. It should be noted, however, that this rule provides a greater measure of guidance for members than does the Georgia procedure which has been upheld by the Supreme Court. In Georgia, once a statutory aggravating factgor has been proved, the statute leaves the decision whether to adjudge death entirely to the jury. *See* Ga. Code Ann. § § 17-10-30, 178-10-31 (1982). (In Georgia, once an aggravating circumstances has been proved, the burden may effectively be on the defendant to show why death should not be adjudged. *See Coker v. Georgia, supra* at 590-91.) Subsection (b)(4)(B) of this rule supplies a standard for that decision. Many state statutes adopt a similar balancing test, although the specific standard to be applied varies. *See e.g.*, Ark. Stat. Ann. § 41-1302 (1977). *Cf. Barclay v. Florida, supra. See also* Analysis, subsection (b)(4)(B), *infra.*

(b) *Procedure.* Subsection (1) is intended to avoid surprise and trial delays. *Cf.* Ga. Code Ann. § 17-10-2(a)(1982). Consistent with R.C.M. 701, its purpose is to put the defense on notice of issues in the case. This permits thorough preparation, and makes possible early submission of requests to produce witnesses or evidence. At the same time, this subsection affords some latitude to the prosecution to provide later notice, recognizing that the exigencies of proof may prevent early notice in some cases. This is permissible as long as the defense is not harmed; ordinarily a continuance or recess will prevent such prejudice.

There is no requirement to plead the aggravating circumstances under subsection (c). (Statutory aggravating circumstances are elements of the offense, and must be pleaded and proved; *see e.g.*, Article 85 (time of war); Article 118(1) (premeditation)). Notice of the aggravating circumstances under this subsection may be accomplished like any other notice in these rules. Note that under R.C.M. 701(a)(5) trial counsel is required to inform the

defense of evidence the prosecution intends to introduce at sentencing.

Subsection (2) makes clear that the prosecution may introduce evidence in aggravation under R.C.M. 1001 (b)(4). Note that depositions are not admissible for this purpose. *See* Article 49(c).

Subsection (3) is based on *Eddings v. Oklahoma* and *Lockett v. Ohio,* both *supra, Cf. Jurek v. Texas, supra.* The accused in courts-martial generally has broad latitude to introduce matters in extenuation and mitigation (*see* R.C.M. 1001(c)) although the form in which they are introduced may depend on several circumstances (*see* R.C.M. 1001(3)). This subsection reemphasizes that latitude. The rule is not intended to strip the military judge of authority to control the proceedings. *Eddings* and *Lockett* should not be read so broadly as to divest the military judge of the power to determine what is relevant (*see* Mil. R. Evid. 401, 403) or to decide when a witness must be produced (*see* R.C.M. 1001(e)). Those cases, and this subsection, stand for the proposition that the defense may not be prevented from presenting any relevant circumstance in extenuation or mitigation.

Subsection (4)(A) establishes the second "threshold" which must be passed before death may be adjudged. The requirement that at least one specific aggravating circumstance be found beyond a reasonable doubt is common to many state statutory schemes for capital punishment. *See e.g.,* Del. Code Ann. tit. 11, § 4209(c)(1977); Ark. Stat. Ann. § 41-1302(1977); Ill. Ann. Stat. Ch. 38, § *1* 9-1(f)(Smith-Hurd 1979), La. Code Crim. Proc. § 905.3 (West Supp 1982); Md. Ann. Code Art. 27 § 413(d)(1982); Ind. Code Ann. § 35-50-2-9(a)(Burns 1979). *See generally United States v. Matthews, supra.*

Subsection (4))(B) establishes guidance for the members in determining whether to adjudge death, once one or more aggravating factors have been found.

Note that under this subsection *any* aggravating matter may be considered in determining whether death or some other punishment is appropriate. Thus, while some factors may alone not be sufficient to authorize death they may be relevant considerations to weigh against extenuating or mitigating evidence. *See Barclay v. Florida* and *Zant v. Stephens,* both *supra. See generally* R.C.M. 1001(b)(4).

The rule does not list extenuating or mitigating circumstances as do some states. Some mitigating circumstances are listed in R.C.M. 1001(c)(1) and (f)(1). *See also* R.C.M. 1001 (f)(2)(B). No list of extenuating or mitigating circumstances can safely be considered exhaustive. *See Eddings v. Oklahoma* and *Lockett v. Ohio,* both *supra; cf. Jurek v. Texas, supra.* Moreover, in many cases, whether a matter is either extenuating or mitigating depends on other factors. For example, the fact that the accused was under the influence of alcohol or drugs at the time of the offense could be viewed as an aggravating or an extenuating circumstances. Whether a matter is extenuating or mitigating is to be determined by each member, unless the military judge finds that a matter is extenuating or mitigating as a matter of law (*see e.g.,* R.C.M. 1001(c)(1) and (f)(1)) and so instructs the members. In contrast to subsection (b)(4)(A) there is no requirement that the members agree on all aggravating, extenuating, and mitigating circumstances under subsection (4)(B) in order to adjudge death. Each member must be satisfied that any aggravating circumstances, including those found under subsection (4)(A) substantially outweigh any extenuating or mitigating circumstances, before voting to adjudge death.

The test is not a mechanical one. *Cf. Zant v. Stephens, supra.* The latitude to introduce evidence in extenuation and mitigtion, the requirement that the military judge direct the members' attention to evidence in extenuation

and mitigation and instruct them that they must consider it, and the freedom of each member to independently find and weigh extenuating and mitigating circumstances all ensure that the members treat the accused "with that degree of uniqueness of the individual" necessary in a capital case. *See Lockett v. Ohio, supra* at 605. Thus each member may place on the scales any circumstance " 'which in fairness and mercy, may be considered as extenuating or reducing the degree' of moral culpatibility or punishment." *Coker v. Georgia, supra* at 591 (1977) (quoting instructions by the trial judge). *See also Witherspoon v. Illinois,* 391 U.S. 510 (1968) (concerning disqualifications of jurors in capital cases based on attitude toward the death penalty).

★ *February 1986 Amendment:* The following stylistic changes were made in R.C.M. 1004(b)(4): first, subparagraph (A) was rewritten to provide that the members must find "at least" one factor under subsection (c); second, a new subparagraph (b) was added to underscore the notice and unanimity requirements with respect to the aggravating factors and to clarify that all members concur in the same factor or factors; and third, former subparagraph (B) was redesignated as subparagraph (C), with an express cross-reference to R.C.M. 1001(b)(4), the general rule governing aggravating circumstances in sentencing proceedings.

Subsection (5) makes clear the evidence introduced on the merits, as well as during sentencing proceedings, may be considered in determining the sentence.

Subsection (6) requires additional instructions in capital cases. *See also* R.C.M. 1005. In determining which aggravating circumstances on which to instruct, the military judge would refer to those of which the trial counsel provided notice. Even if such notice had been given, a failure to introduce some evidence from which the members could

find an aggravating circumstance would result in no instruction being given on that circumstance. *Cf.* R.C.M. 917 The last sentence in this subsection is based on *Eddings v. Oklahoma* and *Lockett v. Ohio,* both *supra.*

Subsection (7) is based on Article 52(b)(1). The requirement for a separate specific finding of one or more aggravating circumstances is new, and is designed to help ensure that death will not be adjudged in an inappropriate case. Subsection (8) operates as a check on this procedure.

(c) *Aggravating circumstances.* The lists of aggravating circumstances under the laws of the states retaining capital punishment were examined and used as guidance for formulating the aggravating circumstances listed here. Those juristictions do not include certain military capital offenses, of course, such as desertion, mutiny, misbehavior as a guard, nor do they address some of the unique concerns or problems of military life. Therefore, several circumstances here are unique to the military. These circumstances, which apply to rape and murder, except as specifically noted, are based on the determination that death is not grossly disproportionate for a capital offense under the code when such circumstances exist, and that the death penalty contributes to accepted goals of punishment in such cases. As to proportionality, the aggravating circumstances together ensure that death will not be adjudged except in the most serious capital offenses against other individuals or against the nation or the military order which protects it. As to goals of punishment, in addition to specifically preventing the most dangerous offenders from posing a continuing danger to society, the aggravating circumstances recognize the role of general deterrence, especially in a combat wetting. *See United States v. Matthews, supra* at 368; *United States v. Gay, supra* at 605-06 (Hodgson, C.J., concurring).

In a combat setting, the potentiality of the death penalty may be the only effective deterrent to offenses such as disobedience, desertion, or misbehavior. The threat of even very lengthy confinement may be insufficient to induce some person to undergo the substantial risk of death in combat. At the same time, the rule ensures that even a servicemember convicted of such very serious offenses in wartime will not be sentenced to death in the absence of one or more of the aggravating circumstances.

In some cases proof of the offense will also prove an aggravating circumstance. *See e.g.,* Article 99 and subsection (c)(1) of this rule. Note, however, that the members would have to return a specific finding under this rule of such an aggravating circumstance before a stenence of death could be based on it. This ensures a unanimous finding as to that circumstance. A finding of not guilty does not ensure such unanimity. *See* Article 52(a)(2); *United States v. Matthews, supra* at 379-80; *United States v. Gay, supra* at 600. The prosecution is not precluded from presenting evidence of additional aggravating circumstances.

Subsection (1) reflects the serious effect of a capital offense committed before or in the presenc e of the enemy. "Before or in the presence of the enemy" is defined in paragraph 23, Part IV. Note that one may be "before or in the presence of the enemy" even when in friendly territory. This distinguishes this subsection from subsection (6).

Subsection (2) and (3) are based on the military's ultimate purpose: protection of national security. That this interest may be basis for the death penalty is well established. *See e.g., Unied States v. Rosenberg,* 195 F.2d 583 (2d Cir. 1952), *cert. denied,* 344 U.S. 838 (1952). The definition of national security, which appears at the end of subsection (c), is based on Exec. Order No. 12065 § 6-104 (June 28, 1978), 43 Fed. Reg. 28949, as amended by Exec.

Order No. 12148 (July 19, 1979), 44 Fed. Reg. 43239, and Exec. Order No. 12163 (Sept. 29, 1979), 44 Fed. Reg. 56673, *reprinted at* 50 U.S.C.A. § 401 (West Supp 1982). The second ("includes") phrase is based on Joint Chiefs of Staff Publication 1. Dictionary of Military and Associated Terms 228 (1 Jul 79). Note that not all harm to national security will authorize death. Virtually all military activities affect national security in some way. *Cf. Cole v. Young,* 351 U.S. 536 (1956); *United States v. Trottier,* 9 M.J. 337 (C.M.A. 1980). Substantial damage is required to authorize death. The discussion provides examples of substantial damage. Rape and murder may be aggravated under subsection (2) because the offender intended to harm national security or a mission, system, or function affecting national security, by the capital offense. Intent to harm the mission, system, or function will suffice. It must be shown, however, that regardless of whether the accused intended to affect national security, the mission, system, or function must have been such that had the intended damage been effected, substantial damage to national security would have resulted.

★ *February 1986 Amendment:* R.C.M. 1004(c)(2) was changed in conjunction with the enactment of the new Article 106a.

Subsection (4) is similar to an aggravating circumstance in many states. *See e.g.,* Neb. Rev. Stat. § 29-2523(1)(f)(1979); Miss. Code Ann. § 99-19-101(5)(c) (1981 Supp.); Ga. Code Ann. § 17-10-30(b) (1982). This circumstance applies to all capital ofenses (except rape) under the code; rape is excluded based on *Coker v. Georgia, supra.*

★ *February 1986 Amendment:* R.C.M. 1004(c)(4) was amended by adding a reference to Article 106a to distinguish this factor from the new aggravating factor in R.C.M. 1004(c)(12). It was also considered appropriate to

exclude Article 104 from this aggravating factor. *See* R.C.M. 1004(c)(11).

Subsection (5) reflects the special need to deter the offender who would desert or commit any other capital offense to avoid hazardous duty. Moreover, the effect such conduct has on the safety of others (including the offender's replacement) and the success of the mission justifies authorizing death. Note that this circumstance applies to all capital offenses, including rape and murder. The person who murders or rapes in order to avoid hazardous duty is hardly less culpable than one who "only" runs away.

Subsection (6) is based on the special needs and unique difficulties for maintaining discipline in combat zones and occupied territories. History has demonstrated that in such an environment rape and murder become more tempting. At the same time the need for order in the force, in order not to encourage resistance by the enemy and to pacify the populace dictates that the sactions for such offenses be severe. Once again, in a combat environment, confinement, even of a prolonged nature, may be an inadequate deterrent.

Subsections (7) and (8) are based generally on examination of the aggravating circumstances for murder in various states. Subsection (7)(A) is intended to apply whether the sentence is adjudged, approved, or ordered executed, as long as, at the time of the offense, the term of confinement is at least 30 years or for life. The possibility of parole or early release because of "good time" or similar reasons does not affect the determination. Subsection (7)(F) is based on 18 U.S.C. § § 351, 1114, and 1751. Subsection (7)(G) is modified to include certain categories of military persons. Subsection (7)(I) uses a more objective standard that the Georgia provision found wanting in *Godfrey v. Georgia, supra.*

★ *February 1986 Amendment:* Three changes were made in R.C.M. 1004(c)(7)(F); first, the provision involving Members of Congress was expanded to include Delegates and Resident commissioners; second, the word "justice" was added to ensure that justices of the Supreme Court were covered; and third, the provision that was extended to include foreign leaders in specified circumstances. These changes are similar to legislation appoved by the Senate in S. 1765, 98th Cong., 1st Sess. (1983).

Subsection (9) is based on the holding in *Coker v. Georgia, supra,* that the death penalty is unconstitutional for the rape of an adult woman, at least where she is not otherwise harmed.

Subsection (10) is based on Article 18. *See also Trial of the Major War Criminals Before the International Military Tribunal* (International Military Tribunal, Nurenberg, 1947); *Trials of War Criminals Before the Nurenberg Military Tribunals,* (U.S. Gov't Printing Off., 1950-51); *In re Yamashita,* 327 U.S. 1 (1946).

★ *February 1986 Amendment:* R.C.M. 1004(c)(11) was added to implement the statutory aggravating factors found in new Article 106a. The aggravating factors in R.C.M. 1004(c)(11) were also considered appropriate for violations of Article 104. It is intended that the phrase "imprisonment for life was authorized by statute" in Article 106a(c)(1) include offense for which the President has authorized confinement for life in this Manual as authorized in Articles 18 and 55 (10 U.S.C. § § 818 and 855).

(d) *Spying.* This subsection is based on Article 106. Congress recognized that in case of spying, no separate sentencing determination is required. *See* Article 52(a)(1). The rule provides for sentencing proceedings to take place, so

that reviewing authorities will have the benefit of any additional relevant information.

The Supreme Court has held a mandatory death penalty to be unconstitutional for murder. *Woodson v. North Carolina, supra: Roberts (Stanislaus) v. Louisiana, supra.* It has not held that a mandatory death penalty is unconstitutional for *any* offense. *See Roberts (Harry) v. Louisiana, supra* at 637 n. 5.

In holding a mandatory death sentence for murder to be unconstitutional, the plurality in *Woodson* emphasized that the prevailing view before *Furman v. Georgia, supra,* was decidedly against mandatory death for murder. Contrarily, death has consistently been the sole penalty for spying in wartime since 1806. *See* W. Winthrop, *Military Law and Precedents* 765-66 (2d ed. 1920 reprint). Before 1920 the statue [*sic*] making spying in time of war triable by court-martial and punishable by death was not part of the Articles of War. *Id. See* A.W. 82 (Act of 4 June 1920, Ch. 227, 41 Stat. 804).

e. *Other penalties.* The second sentence of this subsection is based on the second sentence of the third paragraph of paragraph 126a of MCM, 1969 (Rev.), which was in turn based on JAGA 1946/10582; SPJGA 1945/9511; *United States v. Brewster,* CM 238138, 24 B.R. 173 (1943). As to the third sentence of this subsection, *see also United States v. Bigger,* 2 U.S.C.M.A. 297, 8 C.M.R. 97 (1953); W. Winthrop *supra* at 428, 434.

Rule 1005. Instructions on sentence

Introduction. Except as noted below, this rule and the discussion are taken from paragraph 76*b*(1) of MCM, 1969 (Rev.).

(a) *In general.* Regarding the discussion *see generally*

United States v. Mamaluy, 10 U.S.C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959). *See also United States v. Lania,* 9 M.J. 254 (C.M.A. 1980) (use of general deterrence); *United States v. Smalls,* 6 M.J. 346 (C.M.A. 1979); *United States v. Slaton,* 6 M.J. 254 (C.M.A. 1979) (mental impairment as matter in mitigation); *United States v. Keith,* 22 U.S.C.M.A. 59, 46 C.M.R. 59 (1972) (recommendation for clemency); *United States v. Condon,* 42 C.M.R. 421 (A.C.M.R. 1970) (effect of accused's absence); *United States v. Larochelle,* 41 C.M.R. 915 (A.F.C.M.R. 1969) (Vietnam service).

(b) *When given. See* Fed. R. Crim. P. 30 and paragraph 784*e* of MCM, 1969 (Rev.).

(c) *Requests for instructions. See* Fed. R. Crim. P. 30 and *United States v. Neal,* 17 U.S.C.M.A. 363, 38 C.M.R. 161 (1968). The discussion is based on Fed. R. Crim. P. 30 and paragraph 73*d* of MCM, 1969 (Rev.).

(d) *How given. See* Analysis, R.C.M. 921(d).

(e) *Required instructions.* The reference in the fourth sentence of the discussion of subsection (1) to rehearing or new or other trial is based on paragraph 81*d*(1) of MCM, 1969 (Rev.). The second sentence of the first paragraph and the second paragraph of the discussion to (1) are based on *United States v. Henderson,* 11 M.J. 395 (C.M.A. 1981). The last clause of subsection (3) is based on *United States v. Givens,* 11 M.J. 694, 696 (N.M.C.M.R. 1981). The discussion under subsection (4) is based on the third sentence of paragraph 76*b*(1) of MCM, 1969 (Rev.) and on *United States v. Davidson,* 14 M.J. 81 (C.M.A. 1982).

(f) *Waiver.* This subsection is based on Fed. R. Crim. P. 30.

Rule 1006. Deliberations and voting on sentence

Introduction. Except as noted below, this rule and the discussion are based on Articles 51 and 52 and on paragraphs 76*b*(2) and (3) of MCM, 1969 (Rev.).

(a) *In general.* The first sentence is based on the first sentence of paragraph 76*b*(1) of MCM, 1969 (Rev.).

(b) *Deliberations. See* Analysis, R.C.M. 921(b) concerning the second, third, and fourth sentences of this subsection. *See also United States v. Lampani,* 14 M.J. (C.M.A. 1982).

(c) *Proposal of sentences.* The second clause of the second sentence of this subsection is new and recognizes the unitary sentence concept. *See United States v. Guiterrez,* 11 M.J. 122, 123 (C.M.A. 1981). *See generally Jackson v. Taylor,* 353 U.S. 569 (1957).

(d) *Voting.* As to subsection (3)(A) *see United States v. Hendon,* 6 M.J. 171,. 172-73 (C.M.A. 1979); *United States v. Cates,* 39 C.M.R. 474 (A.B.R. 1968).

As to subsection (d)(5), the second sentence of the third paragraph of paragraph 76*b*(2) of MCM, 1969 (Rev.) has been limited to Article 118 offenses because, unlike Article 106, findings on an Article 118 offense do not automatically determine the sentence and do not require a unanimous vote. *See* Articles 52(a)(1) and (2). Thus a separate vote on sentence for an Article 105 offense is unnecessary.

Supreme Court, U.S.
FILED
AUG 22 1991
OFFICE OF THE CLERK

No. 91-99

In the Supreme Court of the United States

OCTOBER TERM, 1991

RONNIE CURTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that (1) the President lacks the authority to promulgate Rule for Courts-Martial 1004, which establishes court-martial sentencing procedures in capital cases; (2) Rule 1004 is unconstitutional under separation of powers principles; and (3) Article 16(1)(A) of the Uniform Code of Military Justice, 10 U.S.C. 816(1)(A), violates the Constitution by permitting a military defendant to receive a capital sentence from a court-martial panel containing nine members.

1. Petitioner, a member of the United States Marine Corps, was an administrative clerk at Camp Lejeune in North Carolina. First Lieutenant James Lotz was petitioner's superior officer. Apparently due to his belief that Lotz was racially prejudiced, peti-

tioner decided to kill Lotz. Late one evening, petitioner broke into the supply building and stole a K-Bar combat knife. Petitioner gained entry to the Lotzes' home through the ruse that a member of the supply section had been involved in a car accident and needed emergency help. While Lotz was calling for assistance, petitioner fatally stabbed Lotz in the chest and back. Lotz called to his wife before he died. When Mrs. Lotz entered the room, petitioner stabbed her seven times in the head, neck, and back. As. Mrs. Lotz lay on the floor dying, petitioner ripped and cut off her panties and fondled her vaginal area. Petitioner ultimately made his getaway in one of the Lotzes' cars. In so doing, petitioner crashed into a ditch. Petitioner thereafter confessed to the state police during their investigation of the accident. Pet. App. 1a-2a, 2b-5b; 32 M.J. 252, 254 (C.M.A. 1991); 28 M.J. 1074, 1077-1078 (N.M.C.M.R. 1989).

Following a general court-martial at Camp Lejeune, petitioner was convicted of two premeditated murders, larceny, burglary, unlawful entry, indecent assault, damage to government property, and disobeying a general order, in violation of Articles 118, 121, 129, 130, 134, 108, and 92 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 921, 929, 930, 934, 908, and 892. The court-martial panel sentenced petitioner to death. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review, sitting en banc, affirmed. Pet. App. 1b-43b; 28 M.J. 1074 (1989). The Judge Advocate General of the Navy thereafter filed the record with the Court of Military Appeals for its mandatory review pursuant to Art. 67(b)(1), UCMJ, 10 U.S.C. 867(b)(1).

As part of its mandatory review, on May 10, 1990, the Court of Military Appeals entered an order set-

ting oral argument and directing the parties separately to argue two questions: (1) whether Rule 1004 is an impermissible extension of presidential authority; and (2) whether Rule 1004 is facially unconstitutional under the Fifth and Eighth Amendments. 31 M.J. 395. The court heard oral argument on those questions on August 29, 1990. On April 18, 1991, the court issued an opinion, holding that the President has the authority to promulgate Rule 1004 and that the Rule is facially constitutional. 32 M.J. 252. On July 8, 1991, the court heard oral argument on the remaining questions in the case. The court has not yet issued a decision on those questions. Accordingly, it has not entered a final judgment in this case. Pet. App. 38a; 32 M.J. at 271.

2. Petitioner claims that the President lacks the authority to promulgate Rule 1004 and that, if the President does have such power, the Rule is unconstitutional under separation of powers principles. Petitioner also maintains that the imposition of a capital sentence by a court-martial panel consisting of nine members is unconstitutional. Whatever the merits of petitioner's claims, they are not ripe for review by this Court. The Court of Military Appeals has not yet entered a final judgment in this case, because there are issues yet to be resolved that could affect petitioner's convictions or sentence. The court below issued the challenged decision as the first step in a two-step process for resolving petitioner's claims. If the Court of Military Appeals rules in petitioner's favor on any of his remaining contentions and orders a new trial or sentencing hearing, his present claims will become moot. If, on the other hand, the Court of Military Appeals rejects petitioner's remaining contentions and affirms his convictions and sentence,

petitioner will then be able to present his current claims to this Court, together with any other contentions he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the Court of Military Appeals' initial decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1991

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court so requests.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45033

Supreme Court, U.S.
FILED
SEP 16 1991
OFFICE OF THE CLERK

(3)

No. 91-99

In the Supreme Court of the United States

OCTOBER TERM, 1991

RONNIE CURTIS, LANCE CORPORAL
UNITED STATES MARINE CORPS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In its opposition, the United States did not respond on the merits to the significant and incorrectly decided issues presented by the petition. Instead, it argued that the Court of Military Appeals has not yet decided all of the issues in the case and suggested the Court should deny the petition as premature.

On September 10, 1991, the Court of Military Appeals issued a second opinion, reprinted as Appendix A (1a-20a), and decided the remaining issues in this case. While this opinion remanded the case to the Court of Military Review for consideration of other issues, none of the remanded issues involves or will impact on matters presented in the pending petition. The remand will not alter the basic fact that the Court of Military Appeals has issued a definitive ruling on the questions presented in the certiorari petition. There is no reason to think that the Court of Military Appeals will revisit the delegation issues, nor should it be asked to do so. Petitioner rejects respondent's characterization of the lower court's bifurcation of the proceedings as a two step

process of resolving "petitioner's claims." The Court of Military Appeals initially bifurcated its consideration of the case to expeditiously resolve the important constitutional and systemic challenges to the military death penaly system. *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991) (Appendix A to the initial certiorari petition). In fact, the lower Court stated in its September 10 opinion, "Initially we considered and heard extensive oral argument on two issues concerning the constitutionality of the capital punishment procedure under which Curtis was sentenced to death. . . . Having decided issues that would be present in any capital case tried by court-martial, we next considered and heard argument on issues unique to appellant's case." App. 1a-2a. The pendency of further proceedings regarding "issues unique to appellant's case" does not warrant either the respondent's requested denial or delay.

The petition is also ripe because issues presented affect four other men in the Armed Forces who have been sentenced to death by courts-martial and other citizens subject to the Uniform Code of Military Justice who have been or will be charged with capital crimes. In particular, petitioner will still be subject to the death penalty even if he has to be retried. This could mean substantial further proceedings until the death penalty issues in the petition are resolved by this Court. Contrary to the assertion of the respondent, any further relief in the nature of a new trial or a sentencing hearing where appellant's remains in jeopardy will not make petitioner's claims moot. Thus whether the focus is on the military justice system or petitioner alone, there are no good reasons to delay in deciding the threshold questions presented in the petition.

The respondent's argument that the Court should exercise its discretion not to hear the case until petitioner's death sentence is final erroneously assumes that the basis for seeking review is solely the death sentence imposed on petitioner

and avoids the significant issues presented in the petition. The vital systemic questions presented by the lower court's "implicit" delegation rationale and its conclusion that aggravating factors are "procedures" have been definitely resolved for the military, subject only to review by this Court. The implication of the lower court's "implicit" delegation theory and its legal reasoning diminish constitutional limitations on presidential power and provide a basis for immediate review. The lower court's conclusion that aggravating factors are "procedures" permits a variety of government entities, including the President, courts, and administrative agencies, to decide on aggravating factors and to make policy and moral judgments about what factors are sufficiently egregious to warrant the death penalty. The importance of these issues, orderly judicial administration, and fiscal prudence, all point to immediate resolution of the questions presented.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the writ should be granted.

Respectfully submitted,

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SEPTEMBER 16, 1991

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 63,044
NMCM 87-3856

UNITED STATES, APPELLEE

v.

RONNIE A. CURTIS, LANCE CORPORAL
U.S. MARINE CORPS, APPELLANT

Argued July 8, 1990
Decided September 10, 1991

Opinion of the Court

EVERETT, Senior Judge:

Lance Corporal Curtis was tried 4 years ago by a general court-martial convened at Camp Lejeune, North Carolina. His conviction for two murders, burglary, and various other offenses led to an approved death sentence. The findings and sentence were affirmed by the Court of Military Review, 28 MJ 1074 (1989) (en banc), after which the case reached this Court for mandatory review. *See* Art. 67(a)(1), Uniform Code of Military Justice, 10 USC § 867(a)(1) (1989).

Initially we considered and heard extensive oral argument on two issues concerning the constitutionality of the capital punishment procedure under which Curtis was sentenced to

death.[1] Ultimately we decided the two issues adversely to appellant and upheld the constitutionality of RCM 1004, Manual for Courts-Martial, United States, 1984, which prescribes the sentencing procedure in capital cases. 32 MJ 252 (1991).

Having decided issues that would be present in any capital case tried by court-martial, we next considered and heard argument on issues unique to appellant's case.[2]

I

THE GOVERNMENT'S PEREMPTORY CHALLENGE OF STAFF SERGEANT EDWARDS

Lance Corporal Curtis is black. His two murder victims—his supervisor, First Lieutenant James Lotz, and Lotz' wife, Joan—were white. Appellant claims that trial counsel's peremptory challenge of Staff Sergeant Edwards, who is also black, was racially motivated and, therefore, violated *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In *Batson*, the Supreme Court held that, under the Equal Protection Clause of the Fourteenth Amendment, a defendant at a state court trial has the right to be tried by a jury from which no "cognizable racial group" has been excluded. 476 U.S. at 96. Therefore, a prosecutor may not "challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable

---

[1] During some 4 hours of oral argument, we heard not only from counsel for the parties, but also from nine amici curiae. 32 MJ 252, 254 (1991).

[2] This time the argument was briefer—only some 2 hours—and we heard from one amicus. Both oral arguments were televised live on C-SPAN as part of the Court's Project Outreach. This project is intended to make the public more aware of the military justice system and of some of the issues with which it deals—such as the circumstances under which a death penalty may be imposed on a servicemember.

impartially to consider the State's case against a black defendant." *Id.* at 89. Since equal protection is a component of Fifth Amendment due process, *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), the requirements imposed by *Batson* are applicable to federal trials. In *United States v. Santiago-Davila*, 26 MJ 380 (CMA 1988), we specifically held that *Batson* applied to the exercise of government peremptory challenges in trials by courts-martial. Thus, if the prosecutor in appellant's case did challenge Staff Sergeant Edwards for reasons of race, appellant is entitled to a retrial.

In considering appellant's claim, we note at the outset that the general court-martial selected by the convening authority consisted of nine officers and six enlisted members.[3] Three of the nine officers appointed to the court (33 percent) were black. Three of the six enlisted men appointed (50 percent) were also black. Both officers and enlisted persons in these percentages were significantly higher than the corresponding percentages of black officers and enlisted persons at that time in the Marine Corps or in the 2nd Marine Division—to which appellant was assigned.[4] Thus, as the court-

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[3] As authorized by the Uniform Code of Military Justice, appellant had requested that enlisted persons be appointed to serve on his court-martial. Art. 25(c)(1), UCMJ, 10 USC § 825(c)(1).

[4] For the fourth quarter of fiscal year 1987, during which Curtis was tried, the percentage of black officers in the Second Marine Division was 5.5; the percentage of black enlisted persons was 23.9; and the percentage of combined black officers and enlisted was 22.9. The range of black officer percentages in other commands was from 2.0 to 11.4; the range in the percentage of black enlisted persons was from 17.0 to 25.8; and the range in the percentage of combined black officers and enlisted was from 14.5 to 25. As of July 1991 the percentage of black officers in the Marine Corps is 5.1; the percentage of black enlisted personnel is 20.1; and the percentage of combined black officers and enlisted is 18.6

martial had been originally selected by the convening authority, there was no under-representation of either officers or enlisted persons from appellant's racial group; and, indeed, the statistics would suggest that the convening authority had acted affirmatively to assure that the court-martial would have substantial black membership. If trial counsel was attempting to use his peremptory challenge to exclude black members from the court, he not only was violating the precepts of *Batson*, but also was acting contrary to the apparent policy of the general who had appointed the court-martial—and had appointed trial counsel himself.

After the court members had been assembled and had received some general instructions from the military judge, the members were individually—and in order of rank—subjected to voir dire and possible challenge for cause. Colonel Campbell, who was white and was the senior member of the court-martial as appointed, stated that he had seen a report which contained a purported confession by the accused and did "not believe that I could be totally impartial in this hearing." He was challenged for cause by the Government without objection by the defense and excused. Colonel Van Ryzin, who was white, was questioned next and was challenged for cause by the defense because he was the rating officer for another member.[5] The military judge temporarily deferred his ruling on the challenge.

Lieutenant Colonel Ford, a white, was questioned and was not challenged for cause by either side. Lieutenant Colonel Smith, who was black, stated he had had extensive contact with Lieutenant Lotz and did not believe it

---

[5] Appellant's case was tried after the United States Air Force Court of Military Review had ruled that a court member who rated another member was subject to a challenge for cause and prior to our contrary decision on this issue. *United States v. Murphy*, 23 MJ 690, 764 (1986), *rev'd*, 26 MJ 454 (CMA 1988).

was "appropriate" for him to sit as a member of the court. Ultimately he was challenged for cause by the defense without objection by the Government. Major Williams, a white, was seated without challenge. Major Beale, a white, was questioned and neither side had a challenge for cause. Major Cagiano, a white, had known about Lieutenant Lotz; and he was challenged for cause by the defense without objection by the Government.

Captain Emerson, a black, was successfully challenged for cause by the Government on grounds that gave rise to an issue that will be discussed later in this opinion. However, there is no showing that his race was related to the challenge in any way.

Second Lieutenant Luster, a black, was seated without challenged by either side. First Sergeant Baker, a black, was seated without challenge. Gunnery Sergeant Davenport, a black, was seated without challenge; Gunnery Sergeant Denoo, a white, was seated without challenge.

Staff Sergeant Edwards then testified on voir dire. When Edwards was asked by trial counsel whether he agreed with the proposition "that the Government must prove th[e] accused's guilt beyond a reasonable doubt and if the Government" fails to do so, "the accused should be acquitted," he said he did not "understand the question." Then, after an explanation of "reasonable doubt," Edwards stated that he understood what trial counsel meant. After a variety of other questions, trial counsel closed in this manner:

> I'll just asked one general question, Staff Sergeant. How do you feel about, again, being, sitting here as a member in this case? Do you have any feelings about it pro/or con or whatever? Your own words.
>
> MEM(SSGT EDWARDS): I feel, sir, basically that it would be to me a learning experience. And coming in with an open mind, being able to give everything,

> weighing out everything, and listening to all the facts before I finally say whether a person is innocent or guilty, it would be a good experience for me and something that I would like to go through, sir.
>
> TC: You'd also agree that not – it's not only would be a learning experience, it would be a very, very serious responsibility?
>
> MEM(SSGT EDWARDS): Yes, sir.
>
> TC: Possibly one of the more serious responsibilities in your whole life?
>
> MEM(SSGT EDWARDS): Yes, sir.

Defense counsel asked no questions and interposed no challenges for cause.[6]

Sergeant Justice, a white, was then questioned and no challenge for cause was made. Finally, Corporal Fields, a white, was seated without challenge. Subsequently, the military judge granted the defense challenge of Colonel Van Ryzin for cause and asked the Government if it wished to exercise a peremptory challenge.

When the Government challenged Staff Sergeant Edwards peremptorily, the defense objected and requested that the Government state on the record its reasons for the challenge

---

[6] The failure of defense counsel to ask any questions led to this colloquy:

> TC: I have no challenge for cause. I am somewhat concerned although about the defense counsel not voir diring two members, concerning the case.
>
> MJ: Well I think Major Boyett is a lawyer of considerable experience and it is his responsibility to try his case.
>
> DC: There are very few questions that haven't been asked by the time that the trial counsel is over.
>
> MJ: Well, it might be a tribute to your competence and thoroughness, Major.

because, like Curtis, Edwards was black. Trial counsel responded that he would not be obliged to disclose the reasons for his peremptory challenge since three black members would still be on the court after the challenge was granted.

After ascertaining that the defense did not intend to exercise its peremptory challenge, regardless of his ruling on the Government's peremptory challenge, the military judge recessed the trial to review the *Batson* case. After listening to the prosecutor's attempts to distinguish *Batson*, the military judge asked, "[C]an't the Government articulate its reasons?" Trial counsel replied, "I would be happy to, sir." The "articulation" provided thereafter was

> first of all, in my opinion Staff Sergeant Edwards' responses to the voir dire, while satisfactory, didn't indicate to me to be the kind of member that the government would want on this case and one thing particularly that he said, if I remember correctly, he said that he would consider this as a learning experience which, in the government's opinion, that was not the – while not challengeable for cause, that is why the Government chose to exercise its peremptory challenge on him.

The military judge then responded:

> Actually that's the only thing I had written down with regards to him. I think that was probably an unfortunate choice of words, but it certainly caused me to note it.

After ascertaining that the defense did not wish to be heard further, the judge ruled:

> Of course, the convening authority specifically selected Staff Sergeant Edwards. During the challenge for cause there was certainly no evidence whatsoever that the challenges were based on any racial composition. With the challenge of Staff Sergeant Edwards there would

> still be three black members and the military judge finds that the reason stated by the government for exercising its peremptory challenge is at least one that is understandable; may not agree with it, but it appears to have enough foundation to satisfy the rule announced in *Batson v. Kentucky*; therefore, the objection by the defense counsel will be overruled.

In our view *Hernandez v. New York*, 500 U.S. ____, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), is dispositive of appellant's claim. There the defense had raised a *Batson* objection after the prosecutor had peremptorily challenged Hispanic potential jurors. The prosecutor then volunteered the explanation that he had rejected the jurors because "I feel very uncertain that they would be able to listen and follow the interpreter." The judge denied a defense motion for a mistrial; and the Supreme Court ultimately upheld the conviction.

Justice Kennedy, writing for himself and three other Justices, emphasized that under *Batson* a "racially discriminatory intent or purpose" must be shown; and this "implies that the decision-maker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Thus, if the defense makes a prima facie showing of discrimination in the exercise of peremptory challenges by the prosecution, the prosecutor must offer a "neutral explanation," which "means an explanation based on something other than the race of the juror." Of course, if "a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination," it is a "moot" issue whether the defense has "made a prima facie showing." 111 S.Ct. at 1866.

According to Justice Kennedy, "great deference" must be given on appeal (111 S.Ct. at 1868) to a determination by

the trial judge "that the prosecutor did not discriminate on the basis of" race or "ethnicity," the test apparently being one of "clear error." *Id.* at 1871.

Justice O'Connor, with whom Justice Scalia joined, concurred in the judgment and agreed fully with the plurality that the Supreme Court should only "review for clear error the trial court's finding as to discriminatory intent" and that the "finding of no discriminatory intent was not clearly erroneous in this case." 111 S.Ct. at 1873.

With this guidance in mind, we have considered the military judge's ruling that the reasons stated by trial counsel had "enough foundation to satisfy" *Batson*; and it does not appear "clearly erroneous." The preceding events in the appointment and selection of the court members give no hint of any racial bias on the prosecutor's part. Trial counsel's reason for the peremptory challenge—although, as everyone realized, it was not an adequate basis to challenge for cause—does not appear to be a mere pretext used by the prosecutor to conceal a racially motivated purpose. The military judge himself had noted the reference by Staff Sergeant Edwards to the "learning experience" that he would receive.

Although service as a court-martial member or as a juror can be a "learning experience," the focus by Sergeant Edwards on the benefit to him from sitting as a court member may have seemed especially incongruous to the prosecutor in a death penalty case. Certainly many court members might have been more concerned with the awesome responsibility they would assume than with the "learning experience."

Under the view stated by Justice O'Connor in her separate opinion in *Hernandez*, "[a]bsent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise the peremptory strikes for any reason, or no reason at all." 111 S.Ct. at 1874. Under this view, any

explanation for the exercise of a peremptory challenge would suffice – however whimsical it might be; and the role of the explanation by the prosecutor is simply to provide evidence that no racially "discriminatory intent" existed.

According to the rationale offered in the plurality opinion of Justice Kennedy, it would also seem that the race-neutral explanation has no independent significance and is only important as evidence that the prosecutor's peremptory challenge was not racially motivated. However, even if the prosecutor's explanation has to demonstrate that there is a logical basis for exercising the peremptory challenge, we believe this requirement was met here.

Finally, we note that – unlike the explanation offered in *Hernandez*, where the reason offered by the prosecutor would probably have had a disparate effect on Hispanic potential jurors – [7]the explanation offered by trial counsel in this case would have had no tendency towards a "disparate impact" on a "cognizable racial group." In short, there would be no greater likelihood that a black more than a white would be interested in serving on a death case because of the "learning experience" involved. Under these circumstances and giving due deference to the military judge's determination, we must reject appellant's *Batson* challenge.

II

THE CHALLENGE FOR CAUSE TO CAPTAIN EMERSON

Prior to the peremptory challenge of Staff Sergeant Edwards, Captain Emerson, also a black, had been challenged by the prosecution because his religious belief made "it extremely difficult" for him to vote for a death penalty,

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[7] This is at least in part the complaint of Justice Stevens in his dissent for two other Justices in *Hernandez v. New York*, 111 S.Ct. 1859, 1877 (1991).

although he could "consider it." By further questions, trial counsel clarified Captain Emerson's state of mind in this way:

> TC: So you, under no circumstances, because of your religious beliefs could vote for a penalty of death regardless of the facts and circumstances of the case?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: You could consider it, but you could not vote for it?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: Because of your religious beliefs?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: And that's the truth from the bottom of your heart, is it not?
>
> MEM(CAPT EMERSON): Yes, sir.
>
> TC: Captain Emerson?
>
> MEM(CAPT EMERSON): When he asked me do I consider it, I said "I'd consider it." But once again, *I will always go with the other option.*

(Emphasis added.)

The military judge then received an affirmative answer to this question:

> Now, considering the prefatory remarks of Major Boyett, we got to the point in which you were called upon to cast your vote either for the death penalty or for the other alternative punishment. Do I correctly understand that you would in all events cast your vote for the alternative punishment?

Thereafter, in granting the challenge for cause, the military judge stated that Emerson "does have an inelastic attitude," and that, although he "would consider" capital punishment, "I don't think that that consideration would be a mean-

ingful one anyway, and that, notwithstanding his sincerity, he would be compelled to vote for the alternate punishment."

We agree fully with the analysis of the court below, which ruled that the military judge had properly granted the challenge for cause. 28 MJ at 1086-88. In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Supreme Court held that in a death case the Government may challenge a juror for cause if, because of his religious views, he never, under any circumstance, would vote to impose the death penalty. Subsequently *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), and *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), ruled that a juror may be challenged for cause when his views about capital punishment would prevent or substantially impair the performance of his duties as a juror. Thus, unlike *Witherspoon*'s limit of the challenge for cause to jurors who would "automatically" vote against the death penalty, under *Adams* a less rigorous standard is imposed. The Government need only establish the great likelihood that, because of his religious views or moral scruples, the juror would not be able to give meaningful consideration to imposing a death penalty. *See also Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). Here the prosecution made that showing to the reasonable satisfaction of the military judge.

III

THE SENTENCING INSTRUCTIONS

In our previous opinion in this case, we discussed the sentencing procedures provided by RCM 1004 and held that they were constitutionally permissible. We now have reviewed the instructions in this case to determine whether they complied with the intent of RCM 1004.

The military judge reviewed the three aggravating factors on which the Government relied. He reminded the members that they all must agree beyond a reasonable doubt, that a unanimous vote was required to find an aggravating factor, and that the vote on each aggravating factor must be by secret written ballot of all members. The judge also informed the court members that, unless they found "unanimously that at least one of the aggravating factors existed," they could "not adjudge a sentence to death." Moreover, they were told that, even if an aggravating factor were found to exist, "you may not adjudge a sentence to death unless you find that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating factors as you have found existed in the first step of this procedure." After explaining that the members "must . . . consider all matters in extenuation and mitigation and balance them against the aggravating factors," the judge outlined some of the mitigating circumstances that the defense had presented—such as the absence of a criminal record and appellant's church activity.

As we read the judge's instructions, the court members were free to consider any mitigating circumstances. There was no requirement that the members make any finding—by unanimous vote or otherwise—as to the existence of any particular mitigating circumstance. *McKoy v. North Carolina*, 494 U.S. ____, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). The members were informed that they were not free to adjudge a death sentence unless they found "that any and all extenuating or mitigating circumstances [were] substantially outweighed by any aggravating factors"; but they were not directed to adjudge a death sentence if they determined that the aggravating circumstances did outweigh the extenuating and mitigating circumstances. In short, in many respects the instructions by the military judge—like the sentencing procedure established under RCM 1004—were

more favorable to the accused than was constitutionally required.[8]

IV

COMPUTATION OF AGGRAVATING FACTORS

In one respect, however, the procedure employed may have prejudiced Curtis. As we noted in our earlier opinion, three "aggravating factors" were found by the members. In substance they were: 1) "the premeditated murder of" Mrs. Lotz "was committed while [Curtis] was engaged in the commission of a burglary"; 2) "with regard to the premeditated murder of" Mrs. Lotz, Curtis had "been found guilty in the same case of another murder"—that of Lieutenant Lotz; and 3) "with regard to the premeditated murder of" Lieutenant Lotz, Curtis had "been found guilty in the same case of another murder"—that of Mrs. Lotz. 32 MJ at 269.

As we observed in our earlier opinion, several cases have ruled that, when an accused is tried in a single trial for two premeditated murders, there is "a double counting of 'aggravating factors' " if each murder is considered to

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[8] In light of RCM 1004(b)(4), the Court of Military Review upon remand should consider these matters. First, is there a requirement that the findings state explicitly that all members concur that any extenuating or mitigating circumstances are substantially outweighed by the aggravating factors found by the members? Second, does the statement in the instructions that "you may not adjudge a sentence of death unless you find that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating factors . . ." sufficiently inform the members that this finding must be unanimous? Third, must there be an *explict* instruction to the effect that, even if the members unanimously find one or more aggravating factors and even if the members unanimously determine that the extenuating or mitigating circumstances are substantially outweighed by the aggravating factors, they still have the absolute discretion to decline to impose the death sentence?

"aggravate" the other. *Cf. People v. Harris*, 36 Cal. 3d 36, 201 Cal.Rptr. 782, 801, 679 P.2d 433, 452 (1984), *cert. denied*, 469 U.S. 965, 105 S.Ct. 365, 83 L.Ed.2d 301 (1984); *Wilson v. State*, 300 S.E.2d 640, 648 (Ga.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 199, 78 L.Ed.2d 174 (1983); *State v. Goodman*, 257 S.E.2d 569 (NC 1979). On consideration of RCM 1004 and of these precedents, we doubt that the President intended for commission of a double murder to constitute two "aggravating factors," rather than only one.

In one respect the issue is academic. A single "aggravating factor" is sufficient to authorize the death penalty; and here the double murder of Lieutenant Lotz and his wife provides at least the one "aggravating factor" minimally necessary to permit imposition of a death penalty. Moreover, if we set aside an "aggravating factor" which the court-martial found to exit, this does not require resentencing at the trial level, so long as at least the finding of one "aggravating factor" can be affirmed. *Clemons v. Mississippi*, 494 U.S. ____, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

However, we recognize that the number of "aggravating factors" which the members of the court-martial unanimously find to exist may affect their willingness to impose a death sentence. Thus, if there had been six "aggravating factors" found by the court-martial, rather than only three, they might have been even more inclined to adjudge the death sentence; but if only one had been found, they might have been less willing to do so. Whether the number of "aggravating factors" in this case had any effect on the sentence can best be determined by the Court of Military Review on remand.

V

PROPORTIONALITY REVIEW

In its review of the case the Court of Military Review did not specifically undertake any type of "nontraditional proportionality review"—which some states require in capital cases. *See Pulley v. Harris*, 465 U.S. 37, 42-44 (1984). *See e.g., Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In our previous opinion, we noted that such a

> review is not constitutionally required in civilian cases where the statutory procedures adequately direct the sentencing authority's exercise of discretion. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 306, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262, 288 (1987); and *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). In view of the safeguards prescribed by RCM 1004, we are convinced that a "proportionality review" is not required by the Eighth Amendment, which prohibits "cruel and unusual punishments" or by Article 55, [UCMJ,] 10 USC § 855, which prohibits "cruel or unusual punishment."

32 MJ at 270.

The issue of the proper construction of Article 55 is academic.[9] My Brother Judges and I now agree that

[9] Subsequent to our earlier decision, the Supreme Court decided *Harmelin v. Michigan*, 111 S.Ct. 2680 (June 27, 1991), which upheld imposition of a mandatory term of life in prison without possibility of parole as punishment for possessing 672 grams of cocaine. The defendant had contended "that his sentence is unconstitutionally 'cruel and unusual' " because it was " 'significantly disproportionate' to the crime he committed" and because it was mandatory, "without taking into account the particularized circumstances of the crimes and of the criminal." *Id.* at 2684.

In his lead opinion Justice Scalia noted that, although "[i]n 1791, five State Constitutions prohibited 'cruel or unusual punishments;

Article 66(c) of the Code, 10 USC § 866(c), which requires the Courts of Military Review to determine the appropriateness of court-martial sentences, encompasses a limited proportionality review of death sentences. Article 67 also imposes upon us the task of assuring that this review is properly performed by the court below.

We recognize that this is the first case decided under the procedural changes promulgated by the President in the Manual for Courts-Martial, United States, 1984, and, hence, there will be few, if any, cases in military or federal district courts which would be proper subjects for proportionality comparison.[10] However, the gravamen of the offenses here (*i.e.*, double homicide during a burglary) is not unique to the military, and it would be fitting for the Court of Military Review to consider generally similar cases reviewed by the Supreme Court of the United States in which state courts have imposed the death penalty for like crimes on that

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and two prohibited 'cruel' punishments, [t]he new Federal Bill of Rights . . . tracked Virginia's prohibition of 'cruel *and* unusual punishments,' which most closely followed the" English Declaration of Rights of 1689. 111 S.Ct. at 2686 (citations omitted). In criticizing the rationale of *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), Justice Scalia observed that there, the majority had failed to recognize that the Eighth Amendment had prohibited only those punishments that were both cruel and unusual and not those which had only one or the other feature. In this connection he further observed that "a disproportionate punishment can perhaps always be considered 'cruel,' but it will not always be (as the text also requires) 'unusual.' " 111 S.Ct. at 2687.

In our earlier opinion we also quoted from *Solem v. Helm, supra*, for guidance as to the performance of a "proportionality analysis." 32 MJ at 270. Although Justice Scalia criticizes *Solem v. Helm, supra*, and would limit its application to death cases, this portion of this opinion was concurred in only by the Chief Justice, while seven other Justices took differing views.

[10] See *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979), cited in *United States v. Curtis*, 32 MJ at 270 n. 23.

basis. *See United States v. Curtis*, 32 MJ at 270, 271. The Court of Military Review should determine whether the sentence here is appropriate for the crimes of which the accused stands convicted and whether the sentence is *generally* proportional to those imposed by other jurisdictions in similar situations. *See generally McCleskey v. Kemp*, 481 U.S. 279, 306-08, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Pulley v. Harris, supra.*

VI

OTHER ISSUES

In various pleadings filed with this Court, issues have been raised as to the effectiveness of trial defense counsel and even of appellate defense counsel—at least as the latter initialy performed before receiving various types of expert assistance.[11] Since it is necessary to remand this case to the Court of Military Review for reasons already stated, we think it best to let the Court of Military Review also consider these claims in the first instance.

In addition appellate defense counsel have now filed with us a number of "supplemental issues"—67 according to our count.[12] Some of these issues are obviously without merit—

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[11] As a result of orders by our Court, 32 MJ 395, 424 (1990), appellate defense counsel received funds for use in their discretion to obtain the assistance of "death qualified" civilian counsel, to retain expert consultants, or otherwise prepare their case.

[12] We recognize that defense counsel, in the proper performance of their duties, wish to assure that they do not waive any right of appellant to assert these issues in connection with any later collateral attack on the conviction and sentence. *Cf. McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). In view of the unique nature of a capital case and the importance of ensuring that every meaningful issue is judicially considered before a death sentence is carried out, we have allowed the filing. *See* ____ MJ ____ (Daily Journal August 22, 1991).

at least unless the Supreme Court overturns extensive precedent. For example, one questions "whether the court-martial procedures denied appellant of [sic] his Sixth Amendment right to jury trial and an impartial cross-section of the community." However, as to these "supplemental issues," we also think it best that the Court of Military Review have the first opportunity to rule on them.[13]

VII

DISPOSITION OF THE CASE

The decision of the United States Navy-Marine Corps Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further proceedings in accordance with this and the earlier opinion by our Court, including consideration of the "supplemental issues." If that court then determines that no prejudicial error occurred as to the findings or sentence, it shall determine whether Curtis was prejudiced by the doubling up of "aggravating factors." If the court determines that he was not prejudiced thereby, it shall determine whether the death sentence is appropriate in this case, after conducting a proportionality review in accordance with Part V of this opinion.

Chief Judge SULLIVAN concurs.

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[13] In view of our action here, so much of the order of the Court dated August 22, 1991, which grants appellate government counsel the opportunity to file a response before this Court is vacated. Of course, the Court of Military Review may permit such additional pleadings as they deem appropriate.

Cox, Judge (concurring)

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Cox, Judge (concurring):

I concur. However, I also believe that fundamental notions of fairness require that each member of the court-martial sign his or her name to the death-sentence worksheet or that the condemned accused should have the right to poll the members despite RCM 922(e), Manual for Courts-Martial, United States 1984.

U.S. GOVERNMENT PRINTING OFFICE: 1991— · /59006